DOCKET

No. 08-645

Title:	Timothy Mark Cameron Abbott, Petitioner v. Jacquelyn Vaye Abbott
Docketed:	November 17, 2008
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(07-50967)
Decision Date:	September 16, 2008

Questions Presented

Date	Proceedings and Orders
Nov 14 2008	Petition for a writ of certiorari filed. (Response due December 17, 2008)
Dec 17 2008	Brief amicus curiae of the Permanent Bureau of the Hague Conference on Private International Law
Dec 18 2008	Order extending time to file response to petition to and including December 29, 2008.
Dec 29 2008	Brief of respondent Jacquelyn Vaye Abbott in opposition filed. (Distributed)
Dec 30 2008	DISTRIBUTED for Conference of January 16, 2009.
Dec 31 2008	Reply of petitioner Timothy Mark Cameron Abbott filed. (Distributed)
Jan 21 2009	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 28 2009	Brief amicus curiae of United States filed.
Jun 2 2009	Supplemental brief of respondent Jacquelyn Vaye Abbott filed.
Jun 9 2009	DISTRIBUTED for Conference of June 25, 2009.
Jun 29 2009	Petition GRANTED.
Jul 20 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including September 15, 2009.
Jul 20 2009	Record received from U.S.C.A. for 5th Circuit. (1 envelope)
Aug 3 2009	Record received from U.S.D.C. for the Western District of Texas. (1 box)
Sep 9 2009	Consent to the filing of amicus briefs, in support of either party, received from counsel for the respondent.
Sep 14 2009	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for petitioner.
Sep 15 2009	Joint appendix filed.
Sep 15 2009	Brief of petitioner Timothy Mark Cameron Abbott filed.
Sep 21 2009	Brief amici curiae of S&W International ChildFind Program, et al. filed.
Sep 22 2009	Brief amicus curiae of United States filed.
Sep 22 2009	Brief amicus curiae of Reunite International Child Abduction Centre in support of neither party filed.
Sep 22 2009	Brief amicus curiae of National Center for Missing and Exploited Children in support of reversal filed.
Sep 22 2009	Brief amicus curiae of California filed.
Sep 22 2009	Brief amicus curiae of Permanent Bureau of the Hague Conference on Private International Law filed.
Sep 28 2009	The time within which to file respondent's brief on the merits is extended to and including

November 17, 2009.

Oct 5 2009 Motion of S&W International ChildFind Program, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.

Oct 14 2009 Opposition of respondent to motion of S&W International Childfind Program, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.

Nov 2 2009 SET FOR ARGUMENT ON Tuesday, January 12, 2010.

Nov 2 2009 CIRCULATED.

Nov 17 2009 Brief of respondent Jacquelyn Vaye Abbott filed. (Distributed).

Nov 24 2009 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Nov 24 2009 Brief amicus curiae of University of Cincinnati College of Law Domestic Violence and Civil Protection Order Clinic filed. (Distributed)

Nov 24 2009 Brief amici curiae of Domestic Violence Legal Empowerment & Appeals Project, et al. filed. (Distributed)

Nov 24 2009 Brief amici curiae of Eleven Law Professors filed. (Distributed)

Nov 24 2009 Brief amici curiae of Delegates Lawrence H. Stotter, et al. filed. (Distributed)

Dec 1 2009 Letter from counsel for amici curiae Eleven Law Professors proposing to lodge copies of an article cited to in their brief.

Dec 14 2009 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Dec 14 2009 Motion of S&W International ChildFind Program, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.

Dec 17 2009 Reply of petitioner Timothy Mark Cameron Abbott filed. (Distributed).

Jan 12 2010 Argued. For petitioner: Amy Howe, Bethesda, Md.; and Ginger Anders, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Karl E. Hays, Austin, Tex.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 08-___

08-645 NOV 14 2008

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IN THE

Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,

Petitioner,

v.

JACQUELYN VAYE ABBOTT,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Hague Convention on International Child Abduction requires a country to return a child who has been "wrongfully removed" from his country of habitual residence. Hague Convention art. 12. A "wrongful removal" is one that occurs "in breach of rights of custody." *Id.* art. 3. The question presented is:

Whether a ne exeat clause (that is, a clause that prohibits one parent from removing a child from the country without the other parent's consent) confers a "right of custody" within the meaning of the Hague Convention on International Child Abduction.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Mark Cameron Abbott respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a) is published at 542 F.3d 1081. The district court's opinion (Pet. App. 15a) is published at 495 F. Supp. 2d 635.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2008. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Hague Convention on the Civil Aspects of International Child Abduction (Pet. App. 27a), the International Child Abduction Remedies Act (Pet. App. 46a), and Minors Law 16,618 art. 49 (Chile) (Pet. App. 61a) are reproduced in the Petition Appendix.

STATEMENT OF THE CASE

This case presents an important question of international law over which the federal courts of appeals are intractably divided: whether a "ne exeat clause" confers a "right of custody" for purposes of the Hague Convention on International Child Abduction. The conclusion reached by a majority of U.S. courts of appeals directly conflicts with the conclusions of the vast majority of our sister signatories. Moreover, the question presented recurs frequently and in practice is often determinative of parental rights involving children who are taken from their home countries.

1. The United States is a signatory of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 ("Hague Convention" or "Convention"). The Convention exists "to secure the prompt return of children wrongfully removed or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Hague Convention art. 1. Congress implemented the Convention – which came into force in the United States on July 1, 1988, *see* U.S. DEP'T OF STATE, MULTILATERAL TREATIES IN FORCE FOR THE UNITED STATES AS OF JAN. 1, 2007, at 98 (2007) – in the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 et seq.

Under the Convention, a parent has the right to have his or her child returned to the country of the child's habitual residence if the child "has been wrongfully removed or retained." Hague Convention art. 12. Article 3 provides that a removal is wrongful

when it occurs "in breach of rights of custody attributed to a person . . . either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention." Article 5(a) of the Convention in turn provides that "rights of custody shall include rights relating to the care of the person of the child, and, in particular the right to determine the child's place of residence."

In contrast to parents holding rights of custody, parents who merely hold "rights of access" – which the Convention describes as "includ[ing] the right to take a child for a limited period of time to a place other than the child's habitual residence," *see* Hague Convention art. 5(b) – cannot compel their child's return to the country of his habitual residence. Instead, parents can only seek assistance in exercising those rights in the new country. *See id.* art. 21.

2. Petitioner Timothy Abbott, a British citizen, married respondent Jacquelyn Vaye Abbott, a U.S. citizen, in England in 1992. Pet. App. 1a. Petitioner's work as an astronomer specializing in detector science and telescope management took the couple to Hawaii, where their son A.J.A. was born in 1995. Pet. App. 1a. After a three-year stay in the Canary Islands, the Abbotts moved to Chile, where petitioner had accepted a new job. Pet. App. 1a.

Petitioner and respondent separated in March 2003. Pet. App. 1a. Litigation in the Chilean family courts produced various court orders, four of which are relevant here. The first, entered in January 2004, granted petitioner "direct and regular" visitation rights. Pet. App. 17a. The second, entered

in November 2004, left daily care and control of A.J.A. with respondent.[1] Pet. App. 17a. The third, entered in February 2005, expanded petitioner's visitation rights to include a full month of summer vacation. Pet. App. 2a. The fourth, entered on January 13, 2004, prohibited both parents from removing A.J.A. from Chile without written authorization from the court. Pet. App. 2a. In addition to the Chilean family court ne exeat order, petitioner also held a ne exeat right under a Chilean statute that requires authorization from a parent having visitation rights before the other parent may take a child out of Chile. Minor's Law 16,618 art. 49 (Chile) (Pet. App. 61a).

In July 2005, petitioner sought an order from Chilean courts that would have expanded his rights with respect to his son. *See* Pet. App. 2a. Shortly thereafter, in August 2005, respondent violated the ne exeat order and Chilean law, taking petitioner's son out of Chile without petitioner's knowledge or the court's consent. Pet. App. 17a. Petitioner hired a private investigator and, four months after the removal, located his son in Texas. Pet. App. 2a.

3. Petitioner filed this suit in federal district court in Texas, seeking to have his son returned to Chile pursuant to the Hague Convention and ICARA. Pet. App. 18a. The district court denied petitioner's

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[1] Such an order was consistent with Chilean law, which – absent a showing by the father that she is unfit – vests responsibility for the personal care of a child with the mother, without any implication that the father is an inadequate parent. *See* CODE Civil Section 225 (Chile).

request. Pet. App. 15a. Although respondent conceded that her removal violated Chilean law (and in particular the ne exeat order), Pet. App. 6a, 19a-20a, and the court acknowledged that respondent's removal of A.J.A. without petitioner's consent or knowledge "violated and frustrated the Chilean court's order," Pet. App. 24a, the court concluded that the removal was not "wrongful" within the meaning of the Hague Convention because petitioner's ne exeat right did not constitute a right of custody under the Convention. Pet. App. 26a.

4. On appeal, the Fifth Circuit affirmed. As an initial matter, the panel recognized that the courts of appeals are divided on the question whether a ne exeat right constitutes a "right of custody" for purposes of the Hague Convention. Pet. App. 6a-7a. The Fifth Circuit explained that three courts, including the Second Circuit in *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001), had answered the question in the negative, while in *Furnes v. Reeves*, 362 F.3d 702 (11th Cir.), *cert. denied*, 543 U.S. 978 (2004), the Eleventh Circuit had "explicitly rejected *Croll*" by holding that "a ne exeat right alone is sufficient to constitute a custody right." Pet. App. 6a-7a (footnote omitted). The Fifth Circuit also noted that "foreign courts disagree regarding whether ne exeat rights are 'rights of custody' within the meaning of the Hague Convention." Pet. App. 11a.

Adopting the Second Circuit's holding in *Croll*, the Fifth Circuit held that it lacked authority to order A.J.A.'s return to Chile because petitioner had only "rights of access," rather than "rights of custody." *See* Pet. App. 14a. The panel reasoned that although

"[t]he ne exeat order . . . gave [petitioner] a veto right over his son's departure from Chile, . . . it did not give him any rights to determine where in Chile his son would live." Pet. App. 13a. Moreover, the panel emphasized, "the Chilean family court, in its second order, expressly denied the father's request for custody rights and awarded all custody rights to the mother." *Id.* Finally, the panel deemed "persuasive *Croll*'s reasoning that the Hague Convention clearly distinguishes between 'rights of custody' and 'rights of access' and that ordering the return of a child in the absence of 'rights of custody' in an effort to serve the overarching purposes of the Hague Convention would be an impermissible judicial amendment of the Convention." *Id.*

REASONS FOR GRANTING THE WRIT

The Hague Convention is the primary source of international law governing the return of children who have been abducted by a parent to another country. However, federal courts are deeply divided over whether a ne exeat right confers a right of custody under the Hague Convention. This conflict is untenable because it undermines bedrock constitutional principles and creates perverse incentives for would-be child abductors. This case presents an ideal opportunity for this Court to resolve the question presented, which was squarely raised below and was the sole basis for the Fifth Circuit's decision in this case. The Fifth Circuit's decision also breaks with the long-established position taken by the vast majority of our sister signatories that have addressed this issue. Finally, certiorari is also warranted because the Fifth

Circuit's decision is wrong on the merits, frustrating the goals and operation of the Hague Convention.

I. Federal Courts Are Intractably Divided Over Whether A Ne Exeat Clause Constitutes A "Right Of Custody" Under The Hague Convention.

Four appellate courts – the Second, Fourth, Ninth, and now the Fifth – have held that a ne exeat order does not create a "right of custody" under the Hague Convention. The Eleventh Circuit, and at least three state courts, have reached the opposite conclusion. Numerous federal courts and commentators have recognized this direct split in authority. *See, e.g.*, *Altamiranda Vale v. Avila*, 538 F.3d 581, 586 (7th Cir. 2008) ("[In contrast to *Furnes*,] several cases . . . hold that the doctrine of ne exeat does not create a right of custody."); *Lieberman v. Tabachnik*, No. 07-cv-02415-WYD, 2008 WL 1744353, at *9-*10 (D. Colo. Apr. 10, 2008) ("[T]he Eleventh Circuit reached the opposite conclusion of the *Croll* majority."); Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1070-72 (2005).

1. The first federal appellate court to hold that a ne exeat order does not constitute a right of custody under the Hague Convention was the Second Circuit in *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001). In that case, a divided panel of the Second Circuit held that "a ne exeat clause does not transmute access rights into rights of custody under the Convention." *Id.* at 143. First, relying on several U.S. dictionaries, the majority

concluded that the "ordinary meaning" of custody "entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, etc." *Id.* at 136, 138 (emphasis deleted). Positing that "[n]othing in the Hague Convention suggests that the drafters intended anything other than this ordinary understanding of custody," the majority thus reasoned that "*rights* of custody" refers to a "bundle of rights" relating to control over a child's care and upbringing. *Id.* at 139 (emphasis in original). The court rejected Mr. Croll's contention that the ne exeat clause constituted a "right to determine the child's place of residence" and was thus a "'right of custody' . . . protected by the Convention's return remedy." *Id.* Instead, the majority explained, the right to determine a child's residence is merely "indicative" of who actually has custodial rights, while the "power to pick her home country or territory. . . . protects rights of custody and access alike, and is no clue as to who has custody." *Id.* And in any event, the court reasoned, the ne exeat clause only limited Mrs. Croll's right to expatriate her child; it did not vest Mr. Croll with an affirmative right to determine where the child would live. *See id.* This "single veto power" alone, the court found, "falls short of conferring a joint right to determine the child's residence." *Id.*

Second, the majority found that the removal was not "wrongful" because it was not "in breach of custodial rights of the petitioning parent that 'were *actually exercised* . . . *or* would have been so exercised *but for the removal*.'" *Croll*, 229 F.3d at 140 (quoting Hague Convention art. 3) (emphasis in original). A

ne exeat clause, the majority opined, cannot meet this requirement because "the right itself concerns nothing but removal itself," and would never be exercised absent removal. *Id.*

Third, the majority contended that interpreting the Convention to require a child's return based solely on a violation of a ne exeat right would render the Convention unworkable. *Croll*, 229 F.3d at 140. A "foundational assumption" of the Convention, the majority maintained, is that the remedy of return will place the child back into the care of a custodial parent, not a parent "whose sole right—to visit or veto—imposes no duty to give care." *Id.* Because the return order does not also compel the parent who expatriates the child to return, "the effect of compelling [the child's] return . . . would be to alter custody rights rather than to enforce them." *Id.* at 141.

Fourth and finally, the majority pointed to the Convention's ratification history, finding support in the drafters' understanding that different remedies applied to rights of custody and rights of access *Croll*, 229 F.3d at 141-42.

By contrast, the majority declined to attribute any weight to decisions by foreign courts holding that ne exeat rights do constitute "rights of custody," dismissing the foreign decisions as "few, scattered, [and] conflicting" and thus reflecting no consensus view to which deference might be owed. *Croll*, 229 F.3d at 143.

Judge Sotomayor dissented. In her view, "the Convention's text, object and purpose, as well as the relevant case law" all clearly indicate that a ne exeat

clause confers a right of custody. *Croll*, 229 F.3d at 145. Looking first at "the Convention and its official history," Judge Sotomayor concluded that the Convention's drafters intended "a notably more expansive conception of custody rights" than the "parochial" definition gleaned by the majority from American dictionaries. *Id.* at 145-46. The Convention's primary goals were to "prevent[] parents from unilaterally circumventing the home country's custody law" in search of a friendlier forum. *Id.* at 149. Ordering the return of a child who has been abducted in violation of a ne exeat order "directly and fully advances" these goals, she reasoned, because a parent who violates a ne exeat order in her home country "nullifies that country's custody law as effectively as does the parent who kidnaps a child in violation of the rights of the parent with physical custody of that child." *Id.* at 147, 149.

Countering the majority's description of a ne exeat right as a mere veto power unrelated to custody, Judge Sotomayor emphasized that a ne exeat clause in fact gives a parent significant decision-making authority. *Croll*, 229 F.3d at 146. The Convention is not concerned with a child's location within her country of habitual residence; rather, it is designed specifically to protect parents' rights to determine the country in which their children live. *Id.* at 147. In light of this context, Judge Sotomayor reasoned, the right to choose the country in which a child lives must constitute a "right to determine the child's place of residence" under Article 5 and therefore a "right of custody" under the Convention. *Id.* at 148.

Moreover, Judge Sotomayor explained, ne exeat rights differ fundamentally from rights of access. Ne exeat rights, she emphasized, "circumscribe the choices of the parent with physical custody" in a way that access rights do not, because although a parent with access rights may still be able to exercise those rights even after his or her child has been removed, the removal of a child without mutual consent necessarily violates the other parent's ne exeat rights. *Croll*, 229 F.3d at 148. And – contrary to the majority's characterization of the foreign case law – Judge Sotomayor noted that "most foreign courts to consider the issue" have held that a ne exeat order constitutes a right of custody. *Id.* at 150.

The majority's reasoning in *Croll* has largely been adopted by the Fifth Circuit in this case, as well as the Fourth and Ninth Circuits, both of which have held that a ne exeat clause does not constitute a right of custody. *See Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir.), *cert. denied*, 540 U.S. 1068 (2003); *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002).

2. As the Fifth Circuit acknowledged, Pet. App. 3a-4a, the holding of these courts of appeals conflicts with the Eleventh Circuit's decision in *Furnes v. Reeves*, 362 F.3d 702 (11th Cir.), *cert. denied*, 543 U.S. 978 (2004), holding that a ne exeat right, standing alone, "grant[s] . . . a 'right of custody' under the Convention" because it "amounts to the right to determine the child's place of residence." 362 F.3d at 714 (quotation marks omitted).

The court acknowledged the contrary holdings of the Second, Fourth, and Ninth Circuits, but found their reasoning to be "flawed." *Furnes*, 362 F.3d at 719. Specifically, the court rejected the *Croll*

majority's characterization of the ne exeat right as a mere limitation on the right of the sole custodial parent. *Id.* at 720. Instead, the Eleventh Circuit reasoned, when a ne exeat order is in place parents "share a divided right to determine [the child's] place of residence, and . . . each of their rights serves as a limitation on the other's. Stated simply, they possess a joint right to determine [the child's] place of residence." *Id.* That interpretation, the court also explained, was – unlike the Second Circuit's – most consistent with the purpose of the Convention, the drafter's intent, and the reasoning and conclusions of the majority of the courts of sister signatories that have addressed the issue. *Id.* at 717, 720-22.

Three other courts of appeals, while not directly addressing the question presented, have suggested that they too would construe a ne exeat clause as constituting a "right of custody" for purposes of the Convention. In *Shealy v. Shealy*, 295 F.3d 1117, 1122 (10th Cir.), *cert. denied*, 537 U.S. 1048 (2002), the Tenth Circuit held that the removal of the child from Germany to the United States without the father's permission was not wrongful for purposes of the Convention because the particular ne exeat clause at issue allowed the child's removal without the father's permission in cases of military necessity. In affirming the district court's finding that a military necessity indeed existed, the Tenth Circuit appeared to assume that violation of a ne exeat order would constitute a breach of "rights of custody" under the Convention, as it explained that "[i]f a military necessity did exist, then there was no violation of the ne exeat order or, accordingly, of Mr. Shealy's custody rights under German law." 295 F.3d at 1122 & n.3;

see also Lieberman v. Tabachnik, No. 07-cv-02415-WYD, 2008 WL 1744353, at *11 (D. Colo. Apr. 10, 2008) (relying on *Furnes* to hold that the "only logical construction of the term 'right to determine place of residence' in the Convention must encompass decisions regarding whether a child may live outside of their country of habitual residence"). Similarly, in *Altamiranda Vale v. Avila*, 538 F.3d 581 (7th Cir. 2008) (Posner, J.), the Seventh Circuit suggested that a parent with a ne exeat right "clearly" possesses "the right to determine . . . the child's place of residence," *id.* at 586 (quotation omitted); *see also Friedrich v. Friedrich*, 78 F.3d 1060, 1065 n.4 (6th Cir. 1996) (describing decision in *David S. v. Zamira S.*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991), treating ne exeat rights as "custodial," as "ably resolv[ing] a "particularly difficult situation").

The Fifth Circuit's holding also cannot be reconciled with the decisions of three state courts, all of which have held that a removal in violation of a ne exeat clause is wrongful for purposes of the Convention. *See Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999), *cert. denied*, 531 U.S. 811 (2000); *David S. v. Zamira S.*, 574 N.Y.S.2d 429, 432 (N.Y. Fam. Ct. 1991) (deeming a child's removal "wrongful" under the Hague Convention when the other parent had visitation rights and a ne exeat order was in place); *D'Assignies v. Escalante*, No. BD 051876 (Cal. Super. Ct. Dec. 9, 1991), *available at* http://www.hcch.net/incadat/fullcase/0198.htm (same).

3. This division of authority is considered, mature, and entrenched. In reaching its decision in this case, the Fifth Circuit expressly acknowledged

that the Eleventh Circuit's holding in *Furnes* conflicted with those of the Second, Fourth, and Ninth Circuits and opted to follow the latter circuits in holding that a ne exeat right is not a "right of custody" for purposes of the Convention. *See* Pet. App. 3a-4a. Similarly, in *Furnes* the Eleventh Circuit acknowledged the holdings of the Second, Fourth, and Ninth Circuits, but it nonetheless rejected not only those courts' holdings but also every aspect of their reasoning. *See* 362 F.3d at 719-22. Moreover, there is no reason to believe that any of the circuits will reconsider their positions: the Eleventh Circuit denied rehearing en banc in *Furnes*, 107 Fed. Appx. 186 (11th Cir. 2004), while the Second Circuit has recently reaffirmed its holding in *Croll*, *see Duran v. Beaumont*, 534 F.3d 142 (2d Cir. 2008).

Nor would the question presented benefit from further percolation. Not only have the federal courts of appeals thoroughly ventilated the arguments on both sides of the issue, but numerous foreign courts have also weighed in on the status of ne exeat clauses under the treaty, *see infra* Part II. Moreover, the courts that have confronted the question presented in recent years have simply noted the split in authority and chosen sides. It is therefore unlikely that this conflict will be resolved without this Court's intervention.

4. This Court's intervention is also necessary because the current lack of national uniformity both undermines fundamental constitutional principles and obstructs the Convention's proper operation.

As this Court has consistently recognized, uniformity in federal law is particularly important in the field of international relations, where courts must

remember that "the nation-state, not subdivisions within one nation, is . . . the perspective of our treaty partners." *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 175 (1999). The Framers' emphasis on the need for national uniformity reflected their experience during the early years of this nation, as "the national government's efforts to engage in political and commercial relations with other countries [were] undermined by the States" under the Articles of Confederation. Br. *Amicus Curiae* of the United States 12, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (No. 99-274), 2000 WL 194805. In response, the Framers "propose[d] a Constitution that provided for a single national voice over foreign political and commercial affairs." *Id.* at 13. And although the concerns voiced by the Framers and echoed by this Court involve the prospect that a single state's actions may affect the entire union, such concerns are even more pressing when federal law, which was intended to ensure national uniformity, is itself inconsistent.

Moreover, the lack of a uniform interpretation of the Convention "could produce several anomalies" in federal law. *El Al*, 525 U.S. at 171. The first, and most basic, anomaly is that the same case could be decided differently based solely on the judicial circuit to which a parent has opted to remove her child. Thus, for example, if respondent had chosen to settle in Florida rather than Texas, petitioner's child would have been returned to Chile. Such momentous decisions relating to the course of a child's life should not be determined by an accident of geography.

Venue rules may further exacerbate the situation. ICARA provides that venue is proper "in

any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place *where the child is located at the time the petition is filed*." 42 U.S.C. § 11603(b) (emphasis added). Thus, for example, a parent seeking the return of a child currently residing in the Fifth Circuit could avoid that circuit's precedent by serving the other parent with process when he or she takes the child to another circuit – for example, to Disney World in the Eleventh – that applies a contrary interpretation of the Convention. *See Burnham v. Superior Court of Calif.*, 495 U.S. 604 (1990); *cf. Pasten v. Velasquez*, 462 F. Supp. 2d 1206 (M.D. Ala. 2006) (mother moved with child from Texas to Alabama, in violation of Chilean court order limiting mother to three-year stay in Texas to attend school; applying *Furnes*, court reasoned that move was "wrongful" for purposes of Convention because violation of court order "amounts to a violation of [the father's] *ne exeat* right"). In this scenario, ICARA's venue provision would preclude any transfer of the case back to the Fifth Circuit. *See* 28 U.S.C. § 1404(a) ("a district court may transfer any civil action to any other district or division *where it might have been brought*") (emphasis added); *cf. Lops v. Lops*, 140 F.3d 927, 937 (11th Cir. 1998) (children living in South Carolina "located" in Georgia for purposes of ICARA when they were picked up while visiting their grandmother in Georgia).

5. This case is also an ideal vehicle for this Court to resolve the question presented. The facts are undisputed: respondent concedes that she violated the ne exeat order and the Chilean statute prohibiting A.J.A.'s removal, and she does not

contend that any of the Convention's exceptions to the remedy of return in cases of wrongful removal apply here. The question presented is thus squarely raised and outcome determinative in this case, in which the decisions of the courts below rested solely on their conclusion that petitioner lacked "rights of custody."

Nor is there any danger that this case might become moot before this Court can resolve it. Unlike *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir.), *cert. denied*, 540 U.S. 1068 (2003), and *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999), *cert. denied*, 531 U.S. 811 (2000), in which the child was returned pursuant to a lower court order prior to appellate proceedings, petitioner's son remains in the United States. Moreover, because the Convention applies until the child is sixteen, Hague Convention art. 4, and A.J.A. does not reach that age until 2011, Pet. App. 1a, this case offers the opportunity for this Court to consider the question presented unencumbered by any concern that its ultimate decision will have no effect on the parties.

II. The Fifth Circuit's Decision Conflicts With The Position Taken By The Vast Majority Of Sister Signatories That Have Addressed The Issue.

Although certiorari is warranted based solely on the conflict among the federal courts of appeals, certiorari also should be granted because the Fifth Circuit's holding conflicts with the interpretation overwhelmingly adopted by the foreign courts that have addressed this issue. In construing the terms of a treaty, "the opinions of our sister signatories [are]

entitled to considerable weight." *Air France v. Saks*, 470 U.S. 392, 404 (1985) (quotation omitted). But the Fifth Circuit effectively ignored the virtual consensus in favor of treating ne exeat rights as rights of custody.

1. The question presented has arisen in eleven other countries that are signatories to the Convention. In *nine* of those countries, courts have held that ne exeat orders create rights of custody. In so ruling, these courts have relied on the text of the Convention itself and the practical effect of a ne exeat clause, as well as the purpose of the Convention.

One of the first cases to consider the question presented was the English case of *C. v. C.*, in which a mother violated a consent order with a ne exeat clause by taking her child abroad. [1989] 1 W.L.R. 654 (Eng. C.A.). The court held that the ne exeat order conferred rights of custody because the father had "the right to determine that the child should reside in [the country of habitual residence]"; these "limited rights and joint rights," the court explained, are "recognized" under Article 3 and are "within [the] scope" of the Convention. *Id.* at 658.[2] In his concurring opinion, Lord Donaldson acknowledged that "'[c]ustody', as a matter of non-technical English, means 'safe keeping, protection; charge, care, guardianship,'" but he emphasized that "'rights of

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[2] *See also In Re D (a child)* [2007] 1 A.C. 619, ¶ 37 (H.L. 2006) (House of Lords finding removal not wrongful in absence of explicit ne exeat right but also indicating that "a right of veto [requiring consent before child may be removed from country] does amount to 'rights of custody'" for purposes of Convention).

custody' as defined in the convention includes a much more precise meaning . . . . This is 'the right to determine the child's place of residence.'" *Id.* at 663 (Lord Donaldson M.R., concurring). Although this right may take many forms, he continued, "[i]f anyone, be it an individual or the court or other institution or a body, has a right to object [to removal], and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the convention." *Id.* Such a conclusion was also, the court found, consistent with "the whole purpose of this Convention" – that is, "to ensure that parties do not gain adventitious advantage by either removing a child wrongfully from the country of its usual residence, or having taken the child with the agreement of any other party who has custodial rights to another jurisdiction, then wrongfully to retain that child." 1 W.L.R. 654, 661 (citing *Evans v. Evans* [1989] 1 F.L.R. 135, 142 (Eng.)); *see also In the Marriage of: Jose Garcia Resina and Muriel Gislaine Henriette Resina,* Appeal No. 52, 1991 (Fam) (Austl.), ¶ 2, *available at* http://www.austlii.edu.au/au/cases/cth/FamCA/1991/33.html (holding that "[t]he reasoning adopted by the Court of Appeal in *C. v. C.* should be applied in Australia both for reasons of uniformity of interpretation and having regard to the spirit and intendment of the Convention").[3]

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[3] *See also Director-General Department of Families, Youth and Community Care and Hobbs*, 24 Sept. 1999, Family Court of Australia (Brisbane) (rights of custody exist when parental agreement contains a ne exeat clause), *available at* http://www.hcch.net/incadat/fullcase/0294.htm; *State Central*

Courts in six other countries have reached the same conclusion. *See, e.g.*, Oberster Gerichtshof [OGH] [Supreme Court] Feb. 05, 1992, 2 Ob 596/91 (Austria), *available at* http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&code=375&lng=1 (INCADAT summary); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 1997, 2 BvR 1126/97 (F.R.G.), *available at* http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&lng=1&code=338 (INCADAT summary);[4] CA 5271/92 *Foxman v. Foxman* (H.C. 1992) (Isr.) (rights of custody should be "broadly construed," so as to cover cases in which parental consent is required before a child is taken out of the country); *Secretary for Justice v. Abrahams*, Family Court at Taupo, Sept. 3, 2001 (N.Z.), *available at* http://www.hcch.net/incadat/fullcase/0492.htm; *AJ v. FJ*, [2005] CSIH 36, ¶ 7 (Scot.), *available at* http://www.scotcourts.gov.uk/opinions/CSIH36.html (holding that ne exeat clause conferred "the right to determine the children's place of residence and, accordingly, . . . 'custody rights' for the purposes of Article 3 of the Convention"); *M.S.H v. L.H.*, [2000] 3 I.R. 390 (Supreme Court of Ireland), *available at*

Authority v. Ayob, (1997) 137 F.L.R. 283 (Austl.) (same), *available at* http://www.hcch.net/incadat/fullcase/0232.htm.

[4] *See also* Oberlandesgericht Dresden [High Regional Court] Jan. 21, 2002, 10 UF 753/01 (F.R.G.) (rights of custody arose from agreement whereby both parents were obliged to inform the other sixty days before any move), *available at* http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&lng=1&code=486 (INCADAT summary).

http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&lng=1&code=319 (INCADAT summary).

Notably, at least two foreign courts which have held that a ne exeat right is a "right of custody" for purposes of the Convention have expressly rejected the Second Circuit's holding in *Croll* in reaching that conclusion. Thus, in *Sonderup v. Tondelli*, 2000 (1) SA 1171 (CC) (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2000/26.pdf, the Constitutional Court of South Africa declined to adopt the majority's opinion in *Croll*, siding instead with Judge Sotomayor's dissent. *Id.* ¶¶ 22-23. In so doing, the Court emphasized the decisions of other courts holding that a ne exeat right constitutes a "right of custody" for purposes of the Convention. *Id.* ¶ 21 n.23 (citing cases from Australia, Canada, and England). An English appellate court similarly declined to adopt the *Croll* majority's approach; noting Judge Sotomayor's "forceful dissenting opinion," it concluded instead that rights of custody exist via "autonomous," "purposive and effective interpretation" of the Convention. *Re P (A Child) (Abduction: Acquiescence)* [2004] EWCA (Civ) 971, ¶¶ 57-60 (Eng.), *available at* http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&code=591&lng=1 (INCADAT summary).

2. In holding that a ne exeat right is not a "right of custody" for purposes of the Convention, the Second Circuit accorded no weight to the contrary views of foreign courts, citing a purported lack of consensus. *Croll*, 229 F.3d at 143. Instead, the Second Circuit relied solely on decisions from two countries – France and Canada – that allegedly

supported its construction. *Id.* The Second Circuit's reliance, however, was misplaced.

a. In *Ministere Public v. Mme. Y.*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Perigueux, Mar. 17, 1992, D.S. Jur. 1992 (Fr.), a French lower court declined to order the child's return despite a provision in a custody order that required the mother to raise her children in the United Kingdom. That provision, the court reasoned, did not vest the father with a custody right because such an interpretation would infringe on the mother's right to expatriate. *See Croll*, 229 F.3d at 152 (Sotomayor, J. dissenting). But the French court's decision rested on the mother's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms and "did not address the meaning of [the Hague Convention's treatment in] Article 5" of the "right to determine the child's place of residence." *Id.*

In any event, both the Second Circuit in *Croll* and the Fifth Circuit here overlooked a case that is more directly on point: the decision of a French appellate court holding that a ne exeat order *does* create a right of custody for purposes of the Convention. *Ministere Public c. MB*, Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, Mar. 23, 1989, *reprinted in* 79 Rev. crit. 529 (1990). Significantly, the 1989 Special Commission on the Convention specifically noted that the "result and the reasoning of the Court of Appeal of Aix-en-Provence in this case were broadly approved as being in the spirit of the Convention." Permanent Bureau, Hague Commission, *Overall Conclusions of the Special Commission of October 1989 on the Operation of the*

Hague Convention, 29 I.L.M. 219, 223 (Oct. 26, 1989).[5]

b. The situation in Canada is equally complex. In *D.S. v. V.W.*, [1996] 2 S.C.R. 108 (Can.), the Canadian Supreme Court relied on dicta from a prior case, *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (Can.) to hold that it lacked jurisdiction to order a child's return based on the Convention even when the removal had violated an implicit provision of a custody decree.[6] The *D.S.* Court nonetheless affirmed the lower court's order returning the child on the ground that the return was in the child's best interest. 2 S.C.R. 108, ¶ 94.

As Judge Sotomayor observed in *Croll*, however, there are "serious doubts as to whether the [*D.S. v. V.W.*] opinion's conception of *ne exeat* clauses in relation to the Convention truly represents the rule in Canada." 229 F.3d at 153. Specifically, although all of the justices agreed with the result in the *D.S.*

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[5] This Court "traditionally consider[s] as aids to its interpretation . . . the postratification understanding of the contracting parties." *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999) (quotations omitted). The Secretary General of the Hague Conference convened this Commission, at which thirty countries were represented, to resolve questions about the Convention's scope, operation, and meaning.

[6] *Thomson* had held that violation of an interim ne exeat order was a wrongful removal for purposes of the Convention, 3 S.C.R. 551, ¶ 68, but had suggested that return of a child would not be available for violation of a ne exeat clause in a permanent custody order because such an order would be intended only to "ensure permanent access to the non-custodial parent." *Id.* ¶ 69.

case, six of the nine justices expressed only qualified support for the opinion's reasoning, 2 S.C.R. 108, ¶¶ 1, 96, 97, citing a contemporaneous Canadian Supreme Court decision that rejected "the suggestion that the custodial parent has the 'right' to move where he or she pleases." *Goertz v. Gordon*, [1996] 2 S.C.R. 27. ¶ 46 (Can.). Thus, one year after the Court's decision in *D.S.*, the Court of Appeal for British Columbia acknowledged the decision in *Thomson v. Thomson* but nonetheless concluded that a ne exeat order "reserve[s]" in a parent a "right of custody" for purposes of the Convention because it entails "the right to determine the child's place of residence." *See Thorne v. Dryden-Hall* [1997] 148 D.L.R. (4th) 508, ¶ 27 (Can.).

3. Certiorari is also warranted because the conflict between the Fifth Circuit's decision in this case (as well as the holdings of the Second, Fourth, and Ninth Circuits) and the interpretation advanced by the overwhelming majority of courts in our sister signatories contradicts "the need for uniform international interpretation of the Convention," a need Congress recognized in implementing the Hague Convention. 42 U.S.C. § 11601(b)(3)(B). As the legislative history of ICARA makes clear, both Congress and the Executive understood that an antecedent condition to a uniform international interpretation "is the need for uniformity in its interpretation in the United States." H.R. REP. NO.

100-525, at 10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 386, 392.[7]

III. The Fifth Circuit's Decision Is Wrong On The Merits.

Certiorari is also warranted because the Fifth Circuit's decision is wrong on the merits. An analysis of the Convention's text, particularly when considered in light of its animating goals and purposes, as well as its drafting history, demonstrates that a ne exeat clause does in fact constitute a "right of custody" within the meaning of the Convention.

A. The Convention's Definition Of "Rights Of Custody" Includes A Ne Exeat Right.

When interpreting a treaty, courts should "begin with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-35 (1991) (quotation marks omitted); *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999).

1. The Hague Convention provides for the return of a child to the country of habitual residence when the child's removal is "in breach of rights of custody attributed to a person . . . either jointly or alone."

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[7] *See also* H.R. REP. NO. 100-525, at 17-18 (Executive Communication submitted by the U.S. Department of State to the House of Representatives on March 6, 1987 ("Executive Communication")) ("It is hoped that enactment of the bill will ensure greater uniformity in the Convention's implementation and interpretation in the United States.").

Hague Convention art. 3. Although the Convention does not provide a comprehensive definition of "rights of custody," it does indicate that they "*include* rights relating to the care of the person of the child and, *in particular*, the right to determine the child's place of residence." *Id.* art. 5 (emphasis added). The text thus singles out as a paradigmatic example of rights of custody decision-making authority over the child's place of residence. The Convention also distinguishes "rights of custody" from "rights of access," which include "the right to take a child for a limited period of time to a place other than the child's habitual residence," and for which the remedy of return is not available. *Id.*

Particularly when considered in the context of the Convention, a ne exeat right is a "right of custody" under Article 3 because petitioner had – jointly with respondent – the right to determine his child's place of residence. Notwithstanding the Fifth Circuit's characterization (like the Second Circuit before it) of a ne exeat clause as providing nothing more than a "veto right" or "partial power," Pet. App. 8a, a ne exeat order in fact provides a parent with significant power over where the child lives. A parent may grant or withhold consent subject to whatever conditions he or she chooses, and therefore effectively determine the country in which the child will live. Because the Convention is concerned with international, not domestic, relocations, that decision "is precisely the kind of choice the Convention is designed to protect." *Croll*, 229 F.3d at 147 (Sotomayor, J., dissenting).

That a ne exeat clause confers shared, rather than unilateral, power over the child's place of

residence is irrelevant, because the treaty specifically provides that rights of custody may be exercised "either jointly or alone." Hague Convention art. 3; *see also Furnes*, 362 F.3d at 720 (recognizing that each parent possesses such a right). Moreover, even if a ne exeat right were nothing more than a veto or negative right, that "does not diminish its status as a right." *See Croll*, 229 F.3d at 148 n.3 (Sotomayor, J., dissenting) (*citing Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 281 (1990)).

2. Construing a ne exeat clause as a right to determine a child's residence, and therefore a "right of custody" for purposes of the Convention, is also consistent with the Convention's intent to protect "*all* the ways in which custody of children can be exercised" through "a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration." Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ("Perez-Vera Report"), *in* ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 429 (1980) (emphasis in original).[8]

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[8] The Perez-Vera Report is recognized "as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention." U.S. Dep't of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10503 (Mar. 26, 1986); *see also Croll*, 292 F.3d at 137 n.3 ("[W]e have previously said that [the Perez-Vera Report] is an authoritative source for interpreting the Convention's provisions.").

By contrast, a narrow construction of the phrase "right of custody" (adopted by the Fifth Circuit in this case) rests on a definition of "custody" gleaned solely from U.S. dictionaries – an approach that cannot be reconciled with the drafters' decision to promulgate "an autonomous concept" that is "not necessarily coterminous with rights referred to as 'custody rights' created by the law of any particular country or jurisdiction," Permanent Bureau, Hague Commission, *supra*, at 222, rather than favoring any one signatory's conception of custody rights, Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT'L L. & POL. 221, 228 (2000).

3. The broader purposes of the Convention also support the conclusion that a ne exeat clause constitutes a right of custody. The Convention aims to "secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Hague Convention art. 1. The return remedy secures these goals in two ways. First, it deters individuals from taking children across international borders in search of a friendlier forum, by "depriv[ing that] action[] of any practical or juridicial consequences." Perez-Vera Report, *supra*, at 429.[9] Second, it guarantees that

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[9] *See also Croll*, 229 F.3d at 147 (Sotomayor, J., dissenting) (*citing Blondin v. Dubois*, 189 F.3d 240, 245-46 (2d Cir. 1999)); H.R. Rep. No. 100-525 at 18 (Executive Communication) ("It is . . . hoped that [ICARA] will enhance the

custody arrangements ordered by the courts in one member state are respected by the courts in others by "re-establish[ing] a situation unilaterally and forcibly altered by the abductor." *Id.* at 430.

The Convention's interests in deterrence and reciprocal respect for custody arrangements apply just as fully to a ne exeat right as to a physical custody right. A ne exeat order signals – no less clearly than an explicit joint custody order – a court's determination that a child should not be taken from the country absent each parent's consent. It also gives legal effect, in a way that an order granting mere access rights does not, to the court's desire to preserve jurisdiction over the custody dispute. *See* PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 79-80 (1999).

In holding that courts are powerless to order return when a parent violates a ne exeat order, the decision below defeats both of these goals. First, it undercuts deterrence by enabling the abductor to "unilaterally and forcibly alter[]" unsatisfactory custody arrangements. Indeed, because virtually all Hague Convention signatories to consider the question regard ne exeat orders as conferring a "right of custody" and will order the child's return when such an order is violated, would-be abductors have a strong incentive to seek haven in the jurisdictions within the United States that do not. Second, as

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effectiveness of the Convention as a deterrent to future wrongful removals.").

Judge Sotomayor explained in her dissent in *Croll*, *see* 229 F.3d at 147, by failing to accord any respect to the foreign court's expressly stated interest in preserving jurisdiction, the Fifth Circuit's approach effectively nullifies the initial custody determination.

Finally, finding a ne exeat right to be a "right of custody" under the Convention "is the only means of ensuring fairness to all the parties involved," BEAUMONT & MCELEAVY, *supra*, at 87, because "this is the only means of ensuring that the rights of all those concerned are given due consideration in a forum with which all should be familiar," *id.* at 80. Rather than allow one parent to unilaterally alter both parents' custody rights, returning the child allows the debate on the merits to occur in the state of habitual residence, rather than in a new forum that the abducting parent has specifically shopped. *See* Perez-Vera Report, *supra*, at 430.

B. The Convention's *Travaux Préparatoires* Also Support The Conclusion That Ne Exeat Rights Constitute Rights Of Custody.

This Court has long made clear that, in construing a treaty, a court may "traditionally consider[] as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties." *El Al*, 525 U.S. at 167 (emphasis in original) (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)); *Eastern Airlines*, 499 U.S. at 534-35; *Air France v. Saks*, 470 U.S. at 400.

In this case, the *travaux préparatoires* demonstrate that ne exeat rights are rights of

custody under the Convention. During the negotiations leading up to the Convention, the drafters discussed a scenario virtually identical to this case as a hypothetical.[10] The Canadian representative observed that under his reading of the Convention, when a ne exeat order is in place, "[i]f the mother nevertheless leaves the jurisdiction without [the father's] consent, that constitutes wrongful removal." HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 266 (1980). The drafting history makes clear that the participants agreed that "under the present terms of the Convention, the abducted child would have to be sent back immediately," *id.* (statement of Mr. van Boeschoten (Netherlands)); *see also id.* (statement of Mr. Eekelaar (Commonwealth Secretariat)), and thus the text required no additional revision.[11]

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[10] The factual scenario at issue was also one of the earliest problems the Convention was designed to resolve: while discussing the Convention's subject-matter, the Perez-Vera Report directs the reader to the *Questionnaire and Report on International Child Abduction by One Parent*. Perez-Vera Report, *supra*, at 16 n.10. This Questionnaire deals with "five types of situations which are considered to constitute 'child abduction' for the purposes of this questionnaire," including when "[t]he child was removed by a parent from one country to another in violation of a court order which expressly prohibited such removal." Adair Dyer, *Questionnaire and Report on International Child Abduction by One Parent*, *in* ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 9 (1980).

[11] Since the Convention was drafted, scholars have also suggested that the drafters did not revise the text to clarify this point because they failed to recognize that this would become a

In *Croll*, the majority relied on three isolated documents – an article by the chair of the Commission that drafted the Convention, a letter by then-Secretary of State George Schultz, and a snippet from the Perez-Vera Report – that, in its view, demonstrated that "rights of custody" were not intended to encompass a ne exeat right. But the latter two documents are, as Judge Sotomayor explained, entirely question-begging: they both "stand only for the unremarkable proposition that under the Convention, the return remedy is unavailable for breaches of parents' access rights." *Croll*, 229 F.3d at 150 (Sotomayor, J., dissenting). Whether a ne exeat right is merely a right of access is, however, precisely the question presented by this case.

Nor can the statement by A.E. Anton, the chair of the Hague Conference Commission, suggesting that the Commission had "rejected" the view that ne exeat rights fall under "rights of custody," *Croll*, 229 F.3d at 141-42 (citing A. E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 546 (1981)), bear the weight that the Second Circuit has attributed to it. First, as *Croll* acknowledges, Anton actually indicated that the issue "is less clear," because Article 5 only

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major point of contention, given the then-prevailing approach to custody settlements that gave one parent full custody and the other "mere periodic visitation." BEAUMONT & MCELEAVY, *supra*, at 75-77. Today, courts in many countries often craft custody rights to allow both parents to play a role in the child's life, especially with respect to deciding where the child should live. *Id.* at 75.

"suggests" such a view. Anton, *supra*. Second, Anton wrote the article purely in his personal capacity, *id.* at 537 n.*, and there is no reason to favor the personal views of a single drafter over the actual drafting history of the official Commission members.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 14, 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT

No. 07-50967

TIMOTHY MARK CAMERON ABBOTT, Petitioner-Appellant,

v.

JACQUELYN VAYE ABBOTT, Respondent-Appellee

Sept. 16, 2008

Appeal from the United States District Court for the Western District of Texas

Before KING, WIENER, and ELROD, Circuit Judges.

JENNIFER W. ELROD, Circuit Judge:

This case requires us to determine whether *ne exeat* rights constitute "rights of custody" within the meaning of the Hague Convention. For the reasons set forth below, we hold that they do not. We therefore affirm the district court's judgment.

I. FACTS AND PROCEEDINGS

Petitioner-Appellant Timothy Abbott is a British citizen, and Respondent-Appellee Jacquelyn Abbott is a U.S. citizen. The parties married in November 1992 in England, and their son was born in Hawaii in June 1995. Beginning in 2002, the parties and their minor son resided in La Serena, Chile. After the parties separated in March 2003, they litigated in

the Chilean family courts. The mother was awarded custody, and the father was granted visitation rights.

The Chilean courts entered four separate orders. The first, entered in January 2004, provided visitation rights to the father. The second, entered in November 2004, required the parties and their son to undergo private therapy, denied the father's request for custody rights, and granted all custodial rights to the mother. The third, entered in February 2005, expanded the father's visitation rights, including visitation for an entire month of summer vacation. On January 13, 2004, at the mother's request, the Chilean court entered a fourth order prohibiting the child's removal from Chile by either the father or the mother without their mutual consent (the "*ne exeat* order")[1]

In August 2005, the mother removed the child from Chile without the father's consent. She and the child departed without notice in the midst of disputes over visitation and other issues. Motions were pending before the Chilean family court at the time of the child's removal, but the Chilean court had previously awarded all custody rights to the mother in its November 2004 order. The father hired a private investigator and located his son in Texas. The father then filed suit in the United States District Court for the Western District of Texas and sought an order requiring that the child be returned to Chile pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague

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[1] "*Ne exeat*" is defined in the family law context as "[a]n equitable writ restraining a person from leaving, or removing a child or property from, the jurisdiction." BLACK'S LAW DICTIONARY 1060 (8th ed.2004).

Convention"), Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 49.[2]

The district court held a bench trial in February 2007. The mother conceded that she had violated both the Chilean family court's *ne exeat* order and a Chilean statute that required the father's authorization before the child could leave Chile. The father argued that the *ne exeat* order and the statutory *ne exeat* provision gave him "rights of custody" within the meaning of the Hague Convention.[3] The district court denied return of the child, finding that the child's removal from Chile did not constitute a breach of the father's "rights of custody" as defined by the Hague Convention.

II. STANDARD OF REVIEW

We review a district court's interpretation of a treaty de novo. *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir.2001).

III. DISCUSSION

A. The Hague Convention

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[2] Although the father initially pursued only temporary enforcement of his Chilean visitation rights, the subsequent complaint asserting his rights under the Hague Convention was filed within the one-year statute of limitations.

[3] The father also argued that Article 229 of the Chilean Civil Code afforded him certain "residual custodial rights," but the district court correctly concluded that the statute clearly provides only for "access" or visitation rights (the right to "maintain a direct and regular relationship with the child"), not custody rights. See *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142, 149 (2d Cir.2008) (holding in Hague Convention case that Article 229 of the Chilean Civil Code addresses only visitation rights, not custody rights).

The objects of the Hague Convention are (a) to secure the prompt return of children removed from one party country to another in violation of the Convention's terms; and (b) to ensure that rights of custody and rights of access under the law of one party country are respected in the others. *See* Hague Convention art. I. Eighty countries are parties to the Hague Convention, which has been in force between the United States and the Republic of Chile at all times relevant to this case. The Hague Convention is implemented by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11611 (1988), in the United States. The ICARA requires that in any action brought under the Hague Convention for the return of a child, the petitioner prove by a preponderance of the evidence that the child in question "has been wrongfully removed or retained within the meaning of the Convention." *Id.* at § 11603(e)(1)(A).

Article 3 of the Hague Convention provides as follows:

> The removal or the retention of a child is to be considered wrongful where-
>
> a) it is in breach of rights of custody attributed to a person ..., either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

> The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Hague Convention art. III (emphasis added). Thus, the Hague Convention provides the remedy of return of a child only if the child's removal from the country breached "rights of custody attributed to a person." *Id.* The Hague Convention specifically distinguishes between "rights of custody" and "rights of access":

> a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
>
> b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Hague Convention art. V. The remedy of return is available only for a violation of "rights of custody" under the Hague Convention, and that term is defined to include, "in particular, the right to determine the child's place of residence." *Id.*

The dispositive question in the present case is whether the father possessed "rights of custody" as defined by the Hague Convention.

B. Statutory Rights under Chilean Law

A Chilean statute concerning the departure of minors from Chile provides that if a non-custodial parent has visitation rights, that parent's authorization is required before the custodial parent

can take the child out of the country (although a custodial parent may apply to the court for permission to remove the child for an authorized period of time).[4] The mother conceded that she violated the *ne exeat* order by unilaterally removing the parties' son. The district court correctly found that the Chilean statute "does not confer rights distinguishable in any significant way from those conferred by the Chilean court's *ne exeat* order." *Abbott v. Abbott*, 495 F.Supp.2d 635, 638 n. 3 (W.D.Tex.2007). Therefore, in this analysis, any rights accruing to the father under the *ne exeat* order will be treated the same as rights accruing under the statutory *ne exeat* provision.

C. The Circuit Split

Three federal appellate courts have determined that *ne exeat* orders and statutory *ne exeat* provisions do not create "rights of custody" under the Hague Convention. *See Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir.2003); *Gonzalez v. Gutierrez*, 311 F.3d 942, 948 (9th Cir.2002); *Croll v. Croll*, 229 F.3d 133,

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[4] The Chilean statute concerning the departure of minors from Chile, according to the father's expert witness, provides in relevant part:

> If the judge has entrusted custody to one of the parents or to a third party, the legitimate child may not leave except under authorization of the person to whom he has been entrusted.
>
> Once the court has decreed the obligation to allow visits pursuant to the preceding article, authorization of the father or mother who has the right to visit a child shall also be required . . . .
>
> If the authorization cannot be granted or is denied without good reason by one of those who must give it by virtue of this article, it may be granted by the Family Court Judge in the location where the minor resides.

MINORS LAW 16,618 OF CHILE art. 49 (emphasis added).

138-39 (2d Cir.2000). One federal appellate court, however, has reached the opposite conclusion.[5] *See Furnes v. Reeves*, 362 F.3d 702, 719 (11th Cir.2004). The issue is one of first impression in the Fifth Circuit.

1. Second Circuit Opinion in *Croll*

In *Croll*, the custodial mother removed the parties' child from Hong Kong without the consent of the child's father in violation of a Hong Kong court's custody order. The Second Circuit considered whether a *ne exeat* clause in the custody order coupled with rights of access (visitation) conferred "rights of custody" within the meaning of the Hague Convention. 229 F.3d at 135. Recognizing that it was the first federal appellate court to consider the issue, the Second Circuit engaged in an exhaustive analysis of the purpose and design of the Hague Convention, its wording, the intent of its drafters and the case law of other signatory states. *Id.* at 137. The *Croll* court considered the ordinary meaning of the phrase "rights of custody" and determined that the Hague Convention referred to a bundle of rights relating to custody, such that possessing only one of the rights did

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[5] Other federal appellate courts have referenced *Croll* without reaching the present issue of whether *ne exeat* rights are "rights of custody" under the Hague Convention. See, e.g., *Vale v. Avila*, 538 F.3d 581, 585 (7th Cir. 2008) (holding that the court "need not decide whether the doctrine of *ne exeat* creates custody rights" because the petitioner had the right of patria potestas under Venezuelan law, and "[w]hen the parent who does not receive physical custody is given the rights and duties of patria potestas, he has custody rights within the meaning of the Hague Convention"); *Whallon v. Lynn*, 230 F.3d 450, 458 n. 9, 459 (1st Cir.2000) (distinguishing *Croll* and holding that patria potestas rights constitute an "affirmative grant of custody rights to [the petitioner] under Mexican law" and are "rights of custody" under the Hague Convention).

not amount to having "rights of custody." *Id.* at 138-39.

The Second Circuit's analysis is consistent with the emphasis the Hague Convention places on "the right to determine the child's place of residence" because a *ne exeat* veto right is only a partial power-in other words, only one of a bundle of residence-determining rights. The *Croll* court stated that this "single veto power, even if leveraged, falls short of conferring a joint right to determine the child's residence, particularly since an earlier clause in the custody order awards 'custody[,] care and control' solely to the mother." *Id.* at 139-40. The mother had the right to choose where the child would live within Hong Kong, and the father had no control over her choice. Furthermore, although the father could refuse to consent to the child's removal from Hong Kong, he could not require that the child live in another country; thus, he had only a veto right over the child's removal from Hong Kong rather than an affirmative right to determine the child's residence.

While recognizing that the mother's violation of the Hong Kong order had frustrated the father's visitation rights, the Second Circuit refused to judicially amend the Hague Convention's "explicit textual distinction between rights of custody and rights of access." *Id.* at 142. The court held that the Hague Convention's remedy of return is available only if rights of custody are violated, explaining that "the frustration of judicial power is not the touchstone for a return remedy under the Convention." *Id.* The Fourth and Ninth Circuits have followed *Croll*, holding that *ne exeat* rights are not "rights of custody" under the

Hague Convention. *See Fawcett*, 326 F.3d at 500; *Gonzalez*, 311 F.3d at 948.

2. Eleventh Circuit Opinion in *Furnes*

The Eleventh Circuit has explicitly rejected *Croll*. *Furnes*, 362 F.3d at 719. In *Furnes*, a provision in the Norwegian Children Act contained a *ne exeat* clause providing that "[i]f the parents have joint parental responsibility, both of them must consent to the child moving abroad." *Id.* at 707-08. Norwegian law granted parents with visitation rights "joint parental responsibility," which meant in this case that the non-custodial father[6] had the right "to make decisions for the child in personal matters," including "decisions that affect the child's care." *Id.* at 706, 714. Norwegian law also provided, however, that because the child lived with her mother, the mother had the right to determine "where in Norway the child shall live." *Id.* at 708.

The *Furnes* court determined that the custodial mother (who could determine where the child lived within Norway) and the non-custodial father (who could veto the child's removal from Norway) "each

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[6] The Eleventh Circuit explained that a court in Norway had granted custody of the child to the father and had found that the mother instigated conflict and had made false accusations against the father. *Furnes*, 362 F.3d at 704. The mother appealed the court's custody decision, and the parties reached an agreement while the appeal was still pending. *Id.* at 706. The parties agreed that they would maintain "joint parental responsibility" for their daughter according to Norwegian law; that the child would live with her mother, who would have custody; and that the father would have certain rights of access. *Id.* The *Furnes* opinion was based on the *ne exeat* clause and on the custody arrangements set out in the parties' agreement, with Norwegian law defining the term "joint parental responsibility."

possessed elements of [the] place-of-residence right, which they exercised jointly." *Id.* at 719-20. The Eleventh Circuit then held that a *ne exeat* right alone is sufficient[7] to constitute a custody right: "We conclude that this *ne exeat* right grants [the father] a right of custody under the Hague Convention." *Id.* at 714. The court explained,

> [E]ven if [the father's] *ne exeat* right is (we believe incorrectly) viewed as a mere "veto right" or limitation on [the mother's] right to determine [the child's] place of residence, we nevertheless believe that the *ne exeat* right under Norwegian law is a right of custody under the Convention .... [E]ven assuming arguendo that [the father] does not have the right to determine [the child's] place of residence, he has at the very least a veto right relating to the determination of her place of residence-that is, a right "relating to the care of the person" of [the child]. As such, the *ne exeat* right ... provides [the father] with a right of custody over [the child] as defined by the Hague Convention.

Id. at 716. The *Furnes* court reversed the district court's denial of the father's petition and remanded for entry of an order that the child be returned to Norway.

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[7] Another part of the *Furnes* opinion, however, refers to "rights of custody" as derived from a *ne exeat* right in combination with rights of "joint parental responsibility." 362 F.3d at 720 ("We conclude that this *ne exeat* right, especially in the context of [the father's] retained rights under § 30 [giving those with parental responsibility 'the right and duty to make decisions for the child in personal matters'], constitutes a 'right of custody' as defined in the Convention.").

3. Decisions from Other Countries

As the district court noted, foreign courts disagree regarding whether *ne exeat* rights are "rights of custody" within the meaning of the Hague Convention:

> The opinions of courts in other signatory states to the Hague Convention are also "entitled to considerable weight." *Air France v. Saks*, 470 U.S. 392, 404, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985). As outlined in *Gonzalez* and *Croll*, however, the cases from other signatory states addressing the rights conferred on a parent by a *ne exeat* order are "few, scattered, [and] conflicting" and thus do not guide this Court in its consideration of the issue.

Abbott, 495 F.Supp.2d at 638 n. 4. The *Furnes* court catalogued the foreign opinions on the issue, noting that courts in the United Kingdom, Australia, South Africa, and Israel have held that *ne exeat* rights do constitute "rights of custody" under the Hague Convention, while Canadian and French courts have reached the opposite conclusion. *Furnes*, 362 F.3d at 717-18.

D. The District Court's Decision

The district court held a bench trial on February 16, 2007, allowing each side one hour for presentation. It appears that only the father testified at trial, and the facts were essentially undisputed. The mother's attorney conceded that the mother had violated both the Chilean family court's *ne exeat* order and a Chilean statute that required the father's authorization before the child could leave Chile. The mother argued, however, that the father did not have

"rights of custody" within the meaning of the Hague Convention.

In its Findings of Fact and Conclusions of Law, the district court correctly identified the issue as whether the removal was "wrongful" under the Hague Convention, which hinged on whether the father possessed "rights of custody." The district court then factually distinguished Furnes, 362 F.3d 702, noting that the father in Furnes had rights of "joint parental responsibility" while the father in the instant case did not have "Chilean statutorily protected rights to make decisions affecting" his son's care. *Abbott*, 495 F.Supp.2d at 639. The district court then followed *Croll*, *Gonzalez*, and *Fawcett*, holding that the *ne exeat* order did not give the father "rights of custody" but gave him only "veto power over specific places of residence" that the mother might select. *Id.* at 640. The district court noted that entry of the *ne exeat* order did not give the father custody rights or change the mother's daily control over the child. *Id.*

The district court focused on the Hague Convention's distinction between "rights of access" and "rights of custody" and quoted from the official history and commentary on the Hague Convention (which had also been quoted in *Croll* and in *Gonzalez*), confirming that despite a discussion on the issue, there was no agreement by the Hague Convention drafters to establish a remedy of return for violation of "rights of access." *Id.*[8] The district court concluded:

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[8] We need not, and do not, rely on this analogue of legislative history, as the Hague Convention's "explicit textual distinction between rights of custody and rights of access" compels our decision. *See Croll*, 229 F.3d at 142.

> Although Ms. Abbott's removal of [the parties' son] violated and frustrated the Chilean court's order, so too would the removal of a child from a country in which any parent with rights of access resided. Mr. Abbott's right of access, however enhanced and protected by the *ne exeat* order, is simply not sufficient to create rights of custody that warrant the greater protection intended under the Hague Convention. This Court in no way condones Ms. Abbott's action . . . . [The child's] residence in the United States obviously interferes with Mr. Abbott's visitation rights, as established by the Chilean court. However, the Hague Convention explicitly creates a different set of remedies for those parents whose rights of access are frustrated by the custodial parent's removal of a child . . . .

Id. at 640-41 (citation and footnotes omitted). The district court denied return of the child, finding that the father did not establish by a preponderance of the evidence that his son's removal constituted a breach of "rights of custody" as defined by the Hague Convention.

We note that the *ne exeat* order prohibited either parent from removing the child from Chile without the consent of the other. The *ne exeat* order thus gave the father a veto right over his son's departure from Chile, but it did not give him any rights to determine where in Chile his child would live. Furthermore, the Chilean family court, in its second order, expressly denied the father's request for custody rights and awarded all custody rights to the mother.

We find persuasive *Croll's* reasoning that the Hague Convention clearly distinguishes between "rights of custody" and "rights of access" and that ordering the return of a child in the absence of "rights of custody" in an effort to serve the overarching purposes of the Hague Convention would be an impermissible judicial amendment of the Convention. We hold that *ne exeat* rights, even when coupled with "rights of access," do not constitute "rights of custody" within the meaning of the Hague Convention. The Hague Convention provides a remedy of return only for a parent who holds "rights of custody." The father in this case did not hold such rights.

IV. CONCLUSION

Although Jacquelyn Abbott unquestionably violated Mark Abbott's rights by removing their child from Chile without his consent, he possessed only rights of access to the child, and not rights of custody, at the time of the child's removal. Under these circumstances, the Hague Convention does not provide a remedy of return of the child to Chile. We therefore AFFIRM the district court's judgment.

APPENDIX B

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

No. A-06-CA-359-LY

TIMOTHY MARK CAMERON ABBOTT, Petitioner

v.

JACQUELYN VAYE ABBOTT

July 6, 2007

FINDINGS OF FACT AND CONCLUSIONS OF LAW

YEAKEL, District Judge.

BE IT REMEMBERED that on February 16, 2007, this Court called the above entitled and numbered cause of action for trial. Plaintiff Timothy Mark Cameron Abbott ("Mr. Abbott") and Defendant Jacquelyn Vaye Abbott ("Ms. Abbott") each appeared in person and by counsel. Having carefully considered the evidence presented at trial, the pleadings on file, the law applicable to this action, and the arguments of counsel, this Court concludes that Mr. Abbott's request, under the Convention on the Civil Aspects of International Child Abduction done at The Hague on October 25, 1980 ("the Hague Convention"), for the return to Chile of his son, A.J.A., should be denied.[1]

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[1] All findings of fact contained herein that are more appropriately considered conclusions of law are to be so deemed. Likewise, any

Jurisdiction and Venue

This Court has original jurisdiction of this action because it arises under the Hague Convention, implemented by the International Child Abduction Remedies Act ("ICARA"). 42 U.S.C. § 11603(a) ("the courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention"); *see* Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* October 25, 1980, T.I.A.S. 11,670, *reprinted in* 51 Fed.Reg. 10,494 (March 26, 1986). Venue is proper because the Court "is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed," which was Hays County, Texas, within the jurisdiction of the United States District Court for the Western District of Texas, Austin Division. *See* 42 U.S.C. § 11603(b).

Findings of Fact

Mr. and Ms. Abbott were married on November 1, 1992. Their son, A.J.A., was born in Hilo, Hawaii on June 6, 1995. Mr. and Ms. Abbott and A.J.A. resided in La Serena, Chile for approximately three years beginning in 2002. Mr. and Ms. Abbott separated in the month of March, 2003. Following litigation in a Chilean family court concerning the respective parental rights of Mr. and Ms. Abbott, the Chilean court granted daily care and control of A.J.A. to Ms. Abbott and granted Mr. Abbott specific "direct and

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conclusion of law more appropriately considered a finding of fact shall be so deemed.

regular" visitation rights.[2] At Ms. Abbott's request, on January 13, 2004, the Chilean court rendered an Orden de Arriago, or *ne exeat* order, prohibiting A.J.A.'s removal from Chile by either Mr. Abbott or Ms. Abbott without their mutual consent. On August 26, 2005, Ms. Abbott removed A.J.A. from Chile to the United States without Mr. Abbott's prior knowledge or consent and clearly in violation of the Chilean *ne exeat* order. At the time Mr. Abbott filed the Complaint now before this Court, Ms. Abbott and A.J.A. resided in Hays County, Texas. Mr. Abbott seeks return of A.J.A. to Chile pursuant to the Hague Convention and ICARA.

On January 31, 2006, Mr. Abbott filed a "Petition for Temporary Enforcement of Order for Visitation Issued by a Competent Court of the Child's Home State and for Temporary Restraining Order and Order to Show Cause" in the 274th Judicial District Court of Hays County, Texas. Mr. Abbott brought the state-court action under the Texas Family Code, requesting expedited enforcement of the visitation orders rendered by the Chilean court, a temporary restraining order prohibiting Ms. Abbott from removing A.J.A. from Hays and Travis Counties, Texas, and an order requiring Ms. Abbott to show cause why the Court should not grant Mr. Abbott possession of A.J.A. and authorize Mr. Abbott to remove A.J.A. to Chile. See Tex. Fam.Code §§ 152.308 & 105.001 (West 2002). The state court denied the requested relief, but granted Mr. Abbott liberal

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[2] Mr. Abbott contends that he retained residual rights to the care of A.J.A., but careful review of the record reveals that the Chilean family court granted all care and custody rights to Ms. Abbott, despite Mr. Abbott's petitions to the courts for custody of his son.

possession of A.J.A. while Mr. Abbott remained in Texas during the month of February, 2006. Mr. Abbott commenced the present action in this Court on May 11, 2006.

Conclusions of Law

A. The Hague Convention and ICARA

The Hague Convention is an international treaty entered into force for the United States on July 1, 1988, the purpose of which is "to secure the prompt return of children wrongfully removed to or retained in any [c]ontracting [s]tate" and "to ensure that rights of custody and of access under the law of one [c]ontracting [s]tate are effectively respected in the other [c]ontracting [s]tates." Hague Convention, art. 1. ICARA establishes procedures for the implementation of the Hague Convention in the United States. 42 U.S.C. § 11601(b)(1). ICARA's provisions "are in addition to and not in lieu of the provisions of the Hague Convention." *Id.* at § 11601(b)(2).

Mr. Abbott, as the petitioner in the action for return of his child, has the burden of proof to establish by a preponderance of the evidence that A.J.A. "has been wrongfully removed or retained within the meaning of the Convention." *Id.* at § 11603(e)(1)(A). If A.J.A. has been wrongfully removed, the Court must order the return of A.J.A. to Chile immediately, because Mr. Abbott commenced this suit less than one year from the date of A.J.A.'s removal from Chile. *See* Hague Convention, art. 12.

The parties do not dispute that the Hague Convention applies to A.J.A.-he is under sixteen years of age and was "habitually resident" in Chile, a

contracting state to the Hague Convention, at the time of his removal. *Id.* at art. 4. The parties also agree that A.J.A. was removed to the United States, a contracting state to the Hague Convention. *Id.* at art. 1.

The parties' dispute lies in whether A.J.A.'s removal was "wrongful" within the meaning of the Hague Convention. The Hague Convention provides

> [t]he removal or the retention of a child is to be considered wrongful where -
>
> *a* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> *b* at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Id. at art. 3.

Acknowledging that the *ne exeat* order rendered by the Chilean court on January 13, 2004, prohibited either parent's removal of A.J.A. without the other parent's consent, Ms. Abbott concedes that her removal of A.J.A. from Chile was in violation of

Chilean law.[3] This Court may order A.J.A.'s return to Chile, however, only if Ms. Abbott's violation of Chilean law constitutes a "wrongful" removal as defined by the Hague Convention. Mr. Abbott asserts that the removal was wrongful because the *ne exeat* order created a "right[ ] of custody attributed to" Mr. Abbott under Chilean law, which was breached by Ms. Abbott's removal of A.J.A. from Chile. *See id.* at art 3a.

The majority of federal courts considering the issue have determined that a *ne exeat* order or statutory *ne exeat* provision does not accord rights of custody to a parent under the Hague Convention.[4] *E.g. Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir.2003); *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir.2002); *Croll v. Croll*, 229 F.3d 133 (2nd Cir.2000). The Court of Appeals for the Eleventh Circuit has reached the opposite conclusion. *Furnes v. Reeves*, 362 F.3d 702 (11th Cir.2004). However, the case at bar is distinguishable from *Furnes*.

In *Furnes*, a provision in the Norwegian Children Act contained a *ne exeat* clause requiring

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[3] Chilean law also requires the authorization of Mr. Abbott, as a parent with visitation rights, prior to a departure by A.J.A. from Chile. MINOR'S LAW 16,618 art. 49 (Chile). This Court finds that the statute does not confer rights distinguishable in any significant way from those conferred by the Chilean court's *ne exeat* order.

[4] The opinions of courts in other signatory states to the Hague Convention are also "entitled to considerable weight." *Air France v. Saks*, 470 U.S. 392, 404, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985). As outlined in *Gonzalez* and *Croll*, however, the cases from other signatory states addressing the rights conferred on a parent by a *ne exeat* order are "few, scattered, [and] conflicting" and thus do not guide this Court in its consideration of the issue. *Croll*, 229 F.3d at 143; *quoted in Gonzalez*, 311 F.3d at 952.

both parents' consent prior to their child leaving Norway and living abroad. The Norwegian Children Act also granted the father with visitation rights "joint parental responsibility." *Id.* at 704-05, 714. Such responsibility gave the father the right "to make decisions for the child in personal matters," including "decisions that affect the child's care." *See id.* at 714. The *Furnes* court determined that such a right "may well grant [the father] a 'right of custody' as defined under the Convention," further concluding that the father held a right of custody when he had joint parental responsibility combined with the authority stemming from the *ne exeat* clause. *Id.* at 719 (distinguishing *Croll* on basis that father's "*ne exeat* right must be considered in the context of his additional decision-making rights by virtue of his joint 'parental responsibility' under Norwegian law"). Unlike the father in *Furnes*, Mr. Abbott does not have Chilean statutorily protected rights to make decisions affecting A.J.A.'s care.[5] The Fifth Circuit has not considered the effect of a *ne exeat* order on a parent's rights of custody. This Court is guided by *Fawcett*, *Gonzalez*, and *Croll*, finding these cases persuasive and directly applicable to the case sub judice.

"In construing a treaty, as in construing a statute, we first look to its terms to determine its

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[5] Mr. Abbott argues that Chilean law confers "residual" rights to care for the person of A.J.A., pointing to a statute that provides that a parent "who is not personally responsible for the care of a child will not be deprived of the right ... to maintain a direct and regular relationship with the child." See CODE CIVIL art. 229 (Chile). The Court disagrees, concluding that article 229 by its plain terms addresses only visitation rights, not rights to care for a child or other rights of custody as that term is defined by the Hague Convention.

meaning." *United States v. Alvarez-Machain*, 504 U.S. 655, 663, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992). The Court must determine, under the "ordinary meaning" of the Hague Convention, whether Mr. Abbott had custody rights to A.J.A. at the time of A.J.A.'s removal from Chile. *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 638 (5th Cir.1994). The Hague Convention distinguishes two types of parental rights: rights of custody and rights of access, and grants a distinct set of protections to parents with each type of rights. *Compare* Hague Convention, art. 12 (requiring return of child removed in violation of parent's rights of custody) *to id*, art. 21 (describing application process for "arrangements for organizing or securing the effective exercise of rights of access" when child has been removed in violation of parent's rights of access). Only parents with rights of custody are granted the remedy of a court-ordered return to the child's country of habitual residence. *Id.*

The Hague Convention defines rights of custody as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." *Id.*, art. 5. Applying the Hague Convention's definition, this Court finds that the Chilean *ne exeat* order does not accord Mr. Abbott any rights relating to the care of A.J.A.'s person. Neither does the order grant Mr. Abbott a right to "determine" A.J.A.'s place of residence; it merely grants Mr. Abbott the authority to prevent Ms. Abbott from taking A.J.A. to a location outside of Chile by withholding his consent. *See Croll*, 229 F.3d at 139 (referencing definition of "determine" as "to settle or decide by choice of alternative possibilities; to direct or control the end or course of" and concluding that *ne exeat*

order did not grant father right to determine child's residence under the Hague Convention). The order thus grants Mr. Abbott no more than a veto power over specific places of residence that Ms. Abbott might have selected for A.J.A., without any accompanying power to control A.J.A.'s actual residence. *See id.*; *Gonzalez*, 311 F.3d at 949 (distinguishing custodial parent's affirmative right to determine precise location of child's residence from parent's right deriving from *ne exeat* order "to impose a limitation on the custodial parent's right to expatriate his child").

It further defies the ordinary meaning of the term "custody" to conclude that Mr. Abbott gained rights of custody in A.J.A. as a result of the Chilean court's *ne exeat* order. *See Gonzalez*, 311 F.3d at 949 (that father can refuse permission for his children to leave Mexico "hardly amounts to a right of custody, in the plainest sense of the term"). Upon the Chilean court's rendering of the *ne exeat* order, Ms. Abbott continued caring for A.J.A. and maintained control over the daily decisions regarding raising A.J.A., including determining A.J.A.'s place of residence. The order did nothing to affect Mr. Abbott's "say (except by leverage) about any child-rearing issue other than the child's geographical location in the broadest sense." *Croll*, 229 F.3d at 140.

Furthermore, the clear intent of the Hague Convention is to distinguish between rights of access and rights of custody, furnishing greater protection for parents with rights of custody. Letter of Submittal of the Hague Convention on the Civil Aspects of International Child Abduction, by the Secretary of State to the President, Oct. 4, 1985, *reproduced in* 51 Fed.Reg. at 10,496 ("[v]isitation rights are also

protected by the Convention, but to a lesser extent than custody rights"); *Croll*, 229 F.3d at 142 (quoting Perez-Vera Report at 444-45) ("Although the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised ... the majority view was that such situations could not be put in the same category as the wrongful removals which [the Hague Convention] is sought to prevent.").[6] Although Ms. Abbott' removal of A.J.A. violated and frustrated the Chilean court's order, so too would the removal of a child from a country in which any parent with rights of access resided. *See Croll*, 229 F.3d at 142. Mr. Abbott's right of access, however enhanced and protected by the *ne exeat* order, is simply not sufficient to create rights of custody that warrant the greater protection intended under the Hague Convention.[7] This Court in no way condones Ms. Abbott's action. She clearly violated a proper order of the Chilean court-an order she herself sought. A.J.A.'s residence in the United States obviously interferes with Mr. Abbott's visitation rights, as established by the Chilean court. However, the Hague Convention

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[6] The Perez-Vera Report "is recognized . . . as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it." Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed.Reg. 10,503.

[7] Similarly, an order in a divorce decree requiring a mother and her minor child "to remain within the metropolitan area of Monterrey" does not confer custody rights on the father. *Ibarra v. Garcia*, 476 F.Supp.2d 630, 635 (S.D.Tex.2007). Any interference with the father's rights of access resulting from the child's removal in violation of such an order thus does not require return under the Hague Convention. *Id.*

explicitly creates a different set of remedies for those parents whose rights of access are frustrated by the custodial parent's removal of a child from the child's country of habitual residence. *See* Hague Convention, art. 12 and 21 (requiring return of child removed in violation of parent's rights of custody, while permitting parent to request "arrangements for organizing or securing the effective exercise of rights of access" if child is removed in violation of parent's rights of access), Just as the Hague Convention's drafters did not establish the return of the child as a remedy for such a situation, the return of A.J.A. would be equally inappropriate in light of Mr. Abbott's parental rights, to accomplish the purpose of the Hague Convention.

B. Claim Preclusion

By way of affirmative defense, Ms. Abbott asserts, under the doctrine of claim preclusion, that Mr. Abbott is barred from bringing this action in federal court because Mr. Abbott's claims under the Hague Convention could and should have been litigated in Mr. Abbott's previous state-court action. "Under the doctrine of claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Rivet v. Regions Bank*, 522 U.S. 470, 476, 118 S.Ct. 921, 139 L.Ed.2d 912 (1998) (quotations omitted). Because the Court has concluded that Mr. Abbott's action under the Hague Convention fails, the Court need not and will not address Ms. Abbott's claim-preclusion defense.

Conclusion

In accordance with the foregoing, the Court concludes that the Chilean court's *ne exeat* order,

prohibiting the removal of A.J.A. from Chile by either parent without the consent of the other parent, does not confer rights of custody on Mr. Abbott. Mr. Abbott has not demonstrated that Ms. Abbott's removal of A.J.A. from Chile, although in violation of a proper order of a Chilean court, breached Mr. Abbott's rights of custody and was thus "wrongful" under the Hague Convention. The Court will render judgment denying Mr. Abbott's request for the return of A.J.A..

FINAL JUDGMENT

Before this Court is the above-styled case. By Findings of Fact and Conclusions of Law signed this day, the Court concludes that Timothy Mark Cameron Abbott is not entitled to an order returning his son, A.J.A., to Chile under Article 12 of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980 ("the Hague Convention"). Accordingly, the Court signs the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that Timothy Mark Cameron Abbott TAKE NOTHING by his complaint against Jacquelyn Vaye Abbott.

IT IS FURTHER ORDERED that all relief not expressly granted is hereby DENIED.

IT IS FINALLY ORDERED that the case is hereby CLOSED.

APPENDIX C

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

(Concluded 25 October 1980)

(Entered into force 1 December 1983)

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II – CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers.

Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III – RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate

measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV – RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to

promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V – GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of

rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any

other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as

between parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a

Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI – FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval

shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to

one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40,

make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years. Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;

(2) the accessions referred to in Article 38;

(3) the date on which the Convention enters into force in accordance with Article 43;

(4) the extensions referred to in Article 39;

(5) the declarations referred to in Articles 38 and 40;

(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be

deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

APPENDIX D

INTERNATIONAL CHILD ABDUCTION REMEDIES ACT

42 U.S.C.A. §§ 11601 et seq.

§ 11601. Findings and declarations

(a) Findings

The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes--

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

§ 11602. Definitions

For the purposes of this chapter--

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 653 of this title;

(4) the term "petitioner" means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 11606(a) of this title.

§ 11603. Judicial remedies

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of

such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence –

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing –

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter –

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

§ 11604. Provisional remedies

(a) Authority of courts

In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the

provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority

No court exercising jurisdiction of an action brought under section 11603(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

§ 11605. Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

§ 11606. United States Central Authority

(a) Designation

The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) Functions

The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter.

(c) Regulatory authority

The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this chapter.

(d) Obtaining information from Parent Locator Service

The United States Central Authority may, to the extent authorized by the Social Security Act, obtain information from the Parent Locator Service.

(e) Grant Authority

The United States Central Authority is authorized to make grants to, or enter into contracts or agreements with, any individual, corporation, other Federal, State, or local agency, or private entity or organization in the United States for purposes of accomplishing its responsibilities under the Convention and this chapter.

(f) Limited liability of private entities acting under the direction of the United States central authority

(1) Limitation on liability

Except as provided in paragraphs (2) and (3), a private entity or organization that receives a grant from or enters into a contract or agreement with the United States Central Authority under subsection (e) of this section for purposes of assisting the United States Central Authority in carrying out its responsibilities and functions under the Convention and this chapter,

including any director, officer, employee, or agent of such entity or organization, shall not be liable in any civil action sounding in tort for damages directly related to the performance of such responsibilities and functions as defined by the regulations issued under subsection (c) of this section that are in effect on October 1, 2004.

(2) Exception for intentional, reckless, or other misconduct

The limitation on liability under paragraph (1) shall not apply in any action in which the plaintiff proves that the private entity, organization, officer, employee, or agent described in paragraph (1), as the case may be, engaged in intentional misconduct or acted, or failed to act, with actual malice, with reckless disregard to a substantial risk of causing injury without legal justification, or for a purpose unrelated to the performance of responsibilities or functions under this chapter.

(3) Exception for ordinary business activities

The limitation on liability under paragraph (1) shall not apply to any alleged act or omission related to an ordinary business activity, such as an activity involving general administration or operations, the use of motor vehicles, or personnel management.

§ 11607. Costs and fees

(a) Administrative costs

No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) Costs incurred in civil actions

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 11603 of this title shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

§ 11608. Collection, maintenance, and dissemination of information

(a) In general

In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c) of this section, receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or

transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority –

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this chapter.

(b) Requests for information

Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) Responsibility of government entities

Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a) of this section, the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority,

except that any such information the disclosure of which –

(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or

(2) would be prohibited by section 9 of Title 13;

shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a) of this section.

(d) Information available from Parent Locator Service

To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) of this section can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping

The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

§ 11608a. Office of Children's Issues

(a) Director requirements

The Secretary of State shall fill the position of Director of the Office of Children's Issues of the Department of State (in this section referred to as the "Office") with an individual of senior rank who can ensure long-term continuity in the management and policy matters of the Office and has a strong background in consular affairs.

(b) Case officer staffing

Effective April 1, 2000, there shall be assigned to the Office of Children's Issues of the Department of State a sufficient number of case officers to ensure that the average caseload for each officer does not exceed 75.

(c) Embassy contact

The Secretary of State shall designate in each United States diplomatic mission an employee who shall serve as the point of contact for matters relating to international abductions of children by parents. The Director of the Office shall regularly inform the designated employee of children of United States citizens abducted by parents to that country.

(d) Reports to parents

(1) In general

Except as provided in paragraph (2), beginning 6 months after November 29, 1999, and at least once every 6 months thereafter, the Secretary of State shall report to each parent who has requested assistance regarding an abducted child overseas. Each such report shall include information on the current status

of the abducted child's case and the efforts by the Department of State to resolve the case.

(2) Exception

The requirement in paragraph (1) shall not apply in a case of an abducted child if –

(A) the case has been closed and the Secretary of State has reported the reason the case was closed to the parent who requested assistance; or

(B) the parent seeking assistance requests that such reports not be provided.

§ 11609. Interagency coordinating group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of Title 5 for employees of agencies.

§ 11610. Authorization of appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this chapter.

§ 11611. Report on compliance with the Hague Convention on International Child Abduction

(a) In general

Beginning 6 months after October 21, 1998 and every 12 months thereafter, the Secretary of State shall submit a report to the appropriate congressional committees on the compliance with the provisions of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, by the signatory countries of the Convention. Each such report shall include the following information:

(1) The number of applications for the return of children submitted by applicants in the United States to the Central Authority for the United States that remain unresolved more than 18 months after the date of filing.

(2) A list of the countries to which children in unresolved applications described in paragraph (1) are alleged to have been abducted, are being wrongfully retained in violation of United States court orders, or which have failed to comply with any of their obligations under such convention with respect to applications for the return of children, access to children, or both, submitted by applicants in the United States.

(3) A list of the countries that have demonstrated a pattern of noncompliance with the obligations of the Convention with respect to applications for the return of children, access to children, or both, submitted by applicants in the United States to the Central Authority for the United States.

(4) Detailed information on each unresolved case described in paragraph (1) and on actions taken by the Department of State to resolve each such case, including the specific actions taken by the United States chief of mission in the country to which the child is alleged to have been abducted.

(5) Information on efforts by the Department of State to encourage other countries to become signatories of the Convention.

(6) A list of the countries that are parties to the Convention in which, during the reporting period, parents who have been left-behind in the United States have not been able to secure prompt enforcement of a final return or access order under a Hague proceeding, of a United States custody, access, or visitation order, or of an access or visitation order by authorities in the country concerned, due to the absence of a prompt and effective method for enforcement of civil court orders, the absence of a doctrine of comity, or other factors.

(7) A description of the efforts of the Secretary of State to encourage the parties to the Convention to facilitate the work of nongovernmental organizations within their countries that assist parents seeking the return of children under the Convention.

(b) Definition

In this section, the term "Central Authority for the United States" has the meaning given the term in Article 6 of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.

APPENDIX E

MINORS LAW 16,618 OF CHILE
[Certified Translation, reprinted from Court of Appeals Excerpts of Record, page 42]

Article 49.

"The departure of minors from Chile must be subject to the rules set down in this article, without prejudice to the provisions in Law 18,703.

If the custody of a legitimate child has not been entrusted by the judge to any of his parents or to a third party, the child may not leave without authorization of both parents.

If the judge has entrusted custody to one of the parents or to a third party, the legitimate child may not leave except under authorization of the person to whom he has been entrusted.

The departure of a natural child from the country should be authorized by whichever of the parents has voluntarily acknowledged him or by the father and the mother, if both have so done. If the custody of a natural minor has been entrusted by the judge to one of the parents or to a third party, only authorization of one or the other shall be required, as applicable.

Once the court has decreed the obligation to allow visits pursuant to the preceding article, authorization of the father or mother who has the right to visit a child shall also be required.

The permission indicated in the preceding subparagraph shall be given by public deed or by private deed authenticated by a notary public. Such permission will not be necessary if the minor leaves

the country in company of the person or persons who must give that authorization.

If the authorization cannot be granted or is denied without good reason by one of those who must give it by virtue of this article, it may be granted by the Family Court Judge in the location where the minor resides. The judge shall, in authorizing the departure of the minor in these cases, take into consideration the benefit he may reap from the same and indicate the time for which authorization is granted.

Once the period indicated in the preceding subparagraph expires but the minor does not return to the country, the judge may decree the suspension of alimony that may have been decreed.

In all other cases, the authorization of the family court of the minor's residence will be required for him to leave the country.

APPENDIX F

SELECTIONS FROM EXPLANATORY REPORT BY ELISA PÉREZ-VERA

In ACTES ET DOCUMENTS OF THE FOURTEENTH SESSION TOME III, at 426 - 76

B *The objectives of the Convention*

16 The Convention's objects, which appear in article 1, can be summarized as follows: since one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any practical or juridical consequences. The Convention, in order to bring this about, places at the head of its objectives the restoration of the status quo, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'. The insurmountable difficulties encountered in establishing, within the framework of the Convention, directly applicable jurisdictional rules[11] indeed resulted in this route being followed which, although an indirect one, will tend in most cases to allow a final decision on custody to be taken by the authorities of the child's habitual residence prior to its removal.

17 Besides, although the object stated in sub-paragraph *b*, 'to ensure that rights of custody and of access under the law of one Contracting State are

---

[11] Such an option was rejected in the course of the first meeting of the Special Commission. *Cf. Conclusions drawn from the discussions of the Special Commission of March 1979 on legal kidnapping*, prepared by the Permanent Bureau, Prel. Doc. No. 5, June 1979, *supra*, pp. 163-164.

effectively respected in the other Contracting States' appears to stand by itself, its teleological connection with the 'return of the child' object is no less evident. In reality, it can be regarded as one single object considered at two different times; whilst the prompt return of the child answers to the desire to re-establish a situation unilaterally and forcibly altered by the abductor, effective respect for rights of custody and of access belongs on the preventive level, in so far as it must lead to the disappearance of one of the most frequent causes of child abductions.

Now, since the Convention does not specify the means to be employed by each State in bringing about respect for rights of custody which exist in another Contracting State, one must conclude that, with the exception of the indirect means of protecting custody rights which is implied by the obligation to return the child to the holder of the right of custody, respect for custody rights falls almost entirely outwith the scope of the Convention. On the other hand, rights of access form the subject of a rule which, although undoubtedly incomplete, nevertheless is indicative of the interest shown in ensuring regular contact between parents and children, even when custody has been entrusted to one of the parents or to a third party.

18 If the preceding considerations are well-founded, it must be concluded that any attempt to establish a hierarchy of objects of the Convention could have only a symbolic significance. In fact, it would seem almost impossible to create a hierarchy as between two objects which spring from the same concern. For at the end of the day, promoting the return of the child or taking the measures necessary to avoid such removal amount to almost the same thing.

Now, as will be seen below, the one matter which the Convention has tried to regulate in any depth is that of the return of children wrongfully removed or retained. The reason for this seems clear: the most distressing situations arise only after the unlawful retention of a child and they are situations which, while requiring particularly urgent solutions, cannot be resolved unilaterally by any one of the legal systems concerned. Taken as a whole, all these circumstances justify, in our opinion, the Convention's development of rules for regulating the return of the child, whilst at the same time they give in principle a certain priority to that object. Thus, although theoretically the two above-mentioned objects have to be placed on the same level, in practice the desire to guarantee the re-establishment of the *status quo* disturbed by the actions of the abductor has prevailed in the Convention.

19 In a final attempt to clarify the objects of the Convention, it would be advisable to underline the fact that, as is shown particularly in the provisions of article 1, the Convention does not seek to regulate the problem of the award of custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal; this applies as much to a removal which occurred prior to any decision on custody being taken – in which case the violated custody rights were exercised *ex lege* – as to a removal in breach of a pre-existing custody decision.

* * *

Article 3 – The unlawful nature of a removal or retention

a General observations

64 Article 3 as a whole constitutes one of the key provisions of the Convention, since the setting in motion of the Convention's machinery for the return of the child depends upon its application. In fact, the duty to return a child arises only if its removal or retention is considered wrongful in terms of the Convention. Now, in laying down the conditions which have to be met for any unilateral change in the *status quo* to be regarded as wrongful, this article indirectly brings into clear focus those relationships which the Convention seeks to protect. Those relationships are based upon the existence of two facts, firstly, the existence of rights of custody attributed by the State of the child's habitual residence and, secondly, the actual exercise of such custody prior to the child's removal. Let us examine more closely the import of these conditions.

b The juridical element

65 As for what could be termed the juridical element present in these situations, the Convention is intended to defend those relationships which are already protected, at any rate by virtue of an apparent right to custody in the State of the child's habitual residence, *i.e.* by virtue of the law of the State where the child's relationships developed prior to its removal. The foregoing remark requires further explanation in two respects. The first point to be considered concerns the law, a breach of which determines whether a removal or retention is wrongful, in the Convention sense. As we have just said, this is a matter of custody rights. Although the problems which can arise from a

breach of access rights, especially where the child is taken abroad by its custodian, were raised during the Fourteenth Session, the majority view was that such situations could not be put in the same category as the wrongful removals which it is sought to prevent.[24]

This example, and others like it where breach of access rights profoundly upsets the equilibrium established by a judicial or administrative decision, certainly demonstrate that decisions concerning the custody of children should always be open to review. This problem however defied all efforts of the Hague Conference to co-ordinate views thereon. A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.

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[24] *Cf.* Working Document No. 5 (Proposal of the Canadian delegation) and *P.-v.* No 3.

APPENDIX G

NE EXEAT ORDER
[Certified Translation, reprinted from Court of Appeals Excerpts of Record, page 43]

Stamp:
FAMILY COURT
January 13, 2004
CLERK – LA SERENA

Principal Petition: Petition for ne exeat of minor.
First Accessory Petition: Immediate measure.
Second Accessory Petition: Documents are furnished.

TO THE FAMILY COURT JUDGE

CARLOS JORQUERA IBAÑEZ, on behalf of the respondent in the visiting rights case NO. 40,075-03 regarding the minor, ALEXANDER JOSEPH ABBOTT, says to Your Honor that:

This party has received information that the plaintiff, TIMOTHY MARK CAMERON ABBOTT, has obtained a British passport for the minor, ALEXANDER JOSEPH ABBOTT, and intends to leave that country with that minor in a short period of time, all obviously without having the authorization of my principal.

Please note, Your Honor, that this is added to the fact, grave of course, that the minor's father has not returned that minor to his mother and that the mother does not know his whereabouts or the condition of her child, and even fears for his safety. All of this is as we have informed Your Honor in a filing made on even date herewith.

Given the gravity of these events, I petition that Your Honor immediately decree the ne exeat of the

minor and order that this be officially notified by the quickest and most expeditious manner possible to the International Police.

THEREFORE,

I BEG THAT YOUR HONOR grant this petition.

FIRST ACCESSORY PETITION: As explained to Your Honor, I petition for an immediate measure for this motion.

SSECOND [sic] **ACCESSORY PETITION:** I beg that Your Honor consider two certificates to be furnished, issued on January 10 and 12, 2004, by the Chilean Police Force reporting the fact that the father, TIMOTHY MARK CAMERON ABBOTT, has not returned the minor to my principal.

La Serena, January 13, 2004

The principal petition is granted and the Investigative Police must be notified in order to report on the decreed ne exeat of the minor. The first accessory petition is granted as requested.

The documents in the Second Accessory Petition are deemed furnished under notice. The representative of the respondent must be notified by cc. The amendment "NO" is valid.

I DO CERTIFY that the representative of the respondent was notified on this date by cc. La Serena, January 13, 2004.

Deputy Clerk

OPPOSITION BRIEF

(3)

Supreme Court, U.S.
FILED
DEC 29 2008
OFFICE OF THE CLERK

No. 08-645

IN THE
Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,
Petitioner,

v.

JACQUELYN VAYE ABBOTT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a non-custodial parent has the right under the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, to demand that the parent with exclusive rights of custody over the child return the child to his country of habitual residence when the removal from that country by the parent with exclusive rights of custody violates a *ne exeat* order.

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IN THE
Supreme Court of the United States

No. 08-645

TIMOTHY MARK CAMERON ABBOTT,
Petitioner,

v.

JACQUELYN VAYE ABBOTT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BASIS FOR JURISDICTION

The United States District Court for the Western District of Texas had jurisdiction under 42 U.S.C. § 11603(a). The United States Court of Appeals for the Fifth Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

This case presents the question whether a non-custodial parent has the right under the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 (the "Convention"), to demand that the parent with exclusive rights of custody over the child return the child to his country of habitual residence when the removal from that country by the parent with exclusive rights of custody violates a *ne exeat* order. The United States Court of Appeals for the Fifth Circuit properly concluded that the answer to that question is "no."

The Convention draws a sharp distinction between "rights of custody" and "rights of access," and affords the remedy of mandatory return only to a parent who not only *holds* but actively *exercises* "rights of custody." The Convention's avowed purpose is to protect the child by maintaining the custodial *status quo* so that custody proceedings in a nation's courts are not preempted by one parent's unilateral action. Nevertheless, the Convention's signatory nations did not grant the remedy of return for violations of "rights of access," because they could not reach consensus on its propriety or contours. Petitioner, who holds only access rights, asks this Court to rewrite the Convention. Moreover, far from furthering the Convention's purpose of protecting the child by maintaining the custodial *status quo*, Petitioner seeks a draconian remedy of mandatory return of a child to a country from which his sole custodial parent, a U.S. citizen, is absent.

The petition does not remotely justify this Court's review. There is no true conflict in the circuits; the Eleventh Circuit case on which the proposed split depends decided a different issue from the Fifth Circuit, holding only that a *ne exeat* order coupled with a joint right of responsibility under Norwegian law constituted "rights of custody" under the Convention. Nor is Petitioner's portrait of an international consensus opposed to the rule of the American circuit courts accurate; the purported conflict that Petitioner conjures is overstated, and involves a hodge-podge of decisions in a handful of signatory nations on idiosyncratic facts and legal issues not present here. There is no mature and significant conflict among international courts of last resort that might someday warrant this Court's attention. Given the heterogeneous circumstances in which this issue arises, this Court's intervention will do little to promote the uniform interpretation and effective enforcement of the Convention. The petition should be denied.

1. Background On The Convention. The Convention, implemented in this country by the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11611, draws a sharp distinction between "rights of custody" and "rights of access." As defined by the Convention, "rights of custody" "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Convention art. 5(a). "Rights of access," in contrast, "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention art. 5(b).

The distinction between "rights of custody" and "rights of access" has real meaning. Under the Convention, a parent has a right to have his child returned to the country of the child's habitual residence only if that parent's "rights of custody" have been violated by the removal. Convention arts. 3, 12. A parent who enjoys only "rights of access" has some remedies under the Convention but does not have the right to petition for the child's return.

The custodial parent's return remedy is not absolute. A parent who enjoys "rights of custody," but who was "not actually exercising the custody rights at the time of removal or retention," loses the right to seek return. Convention art. 13(a). Nor will a signatory country grant a petition for return if there is "a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" or if return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Convention arts. 13, 20.

These provisions reflect the Convention's overarching goal of protecting the child's best interests. As the Convention states, its signatories were "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody." Convention, pmble.

2. Factual Background. Respondent Jacquelyn Abbott is a United States Citizen. Pet. App. 1a. She married Petitioner Timothy Abbott, a British Citizen, in November 1992 and had a son with him in 1995. *Id.* The boy was born in Hawaii and is a U.S. citizen.

Id. Beginning in 2002 and until Mr. and Ms. Abbott separated in March 2003, the parties resided with their son in La Serena, Chile. *Id.*

After Mr. and Ms. Abbott separated, they litigated over the custody of their son in Chilean Courts. Pet. App. 1a-2a. Over the years, the Chilean Court entered four separate custody orders. Pet. App. 2a. The first, a January 2004 order, granted visitation rights to the Petitioner, Mr. Abbott. *Id.* The second, a November 2004 order, denied Mr. Abbott's custody request, granting *all* custodial rights to Respondent Ms. Abbott. *Id.* The third, a February 2005 order, granted Mr. Abbott some additional visitation, including some summer-vacation time. *Id.* The fourth, a January 13, 2004 *ne exeat* order granted at Ms. Abbott's request, prohibited either parent from removing the child from Chile without the other parent's consent. *Id.* Because the visa that permitted Ms. Abbott to live in Chile did not permit her to work for pay, Ms. Abbott had no means of economic support in Chile after the separation. On August 26 2005, Ms. Abbott took her son back to the United States. At the time of the removal, Ms. Abbott enjoyed "all custody rights" pursuant to the Chilean Court's November 2004 order. *Id.* Ms. Abbott and her son now reside in Texas. *Id.*

3. Judicial Proceedings. Mr. Abbott filed a "Petition for Temporary Enforcement of Order for Visitation Issued by a Competent Court of the Child's Home State and for Temporary Restraining Order and Order to Show Cause" in the 274th Judicial District Court of Hays County, Texas on January 31, 2006. Pet. App. 17a. Although Mr. Abbott could have denominated his claims under the Convention

because the International Child Abduction Remedies Act vests concurrent original jurisdiction in both state and federal courts, *see* 42 U.S.C. § 11603(a), he did not do so. Pet. App. 17a. Nevertheless, he sought the same relief, an order allowing him to take his son to Chile. *Id.* The Hays County court granted Mr. Abbott visitation during February 2006 while Mr. Abbott was in Texas but otherwise denied him relief. *Id.*

In May 2006, after the Hays County court's decision, Mr. Abbott filed this action styling his claim as one for relief under the Convention and the International Child Abduction Remedies Act. Pet. App. 18a. Mr. Abbott's argument was that the *ne exeat* provision in the Chilean court order that Ms. Abbott requested to safeguard her sole custody rights gave *Mr. Abbott* "rights of custody" as defined in the Convention. Pet. App. 23a. This, Petitioner argued, entitled him to an order from the District Court directing his son, a U.S. citizen, to return to Chile. *Id.* As noted, neither Petitioner nor Respondent are citizens of Chile. Pet. App. 1a. Mr. Abbott's argument hinged on characterizing the *ne exeat* order as a "right to determine the child's place of residence," language used in the Convention to describe what it means by "rights of custody."

The District Court denied Mr. Abbott's petition, concluding that it "defies the ordinary meaning of the term 'custody' to conclude that Mr. Abbott gained rights of custody . . . as a result of the Chilean court's *ne exeat* order." *Id.* The District Court took special notice of certain facts including that "[u]pon the Chilean Court's rendering of the *ne exeat* order, Ms. Abbott continued caring for [her son] and maintained

control over the daily decisions regarding raising [her son,] including determining [his] place of residence." *Id.* The District Court concluded that the *ne exeat* order "did nothing to affect Mr. Abbott's say (except by leverage) about any childbearing issue other than the child's geographical location in the broadest sense.'" *Id.*

Addressing *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), the case central to Mr. Abbott's cert petition here, the District Court found it to be *factually* inapposite. Pet. App. 21a. Specifically, the Court concluded that under the Norwegian Children Act, the foreign law at issue in *Furnes*, the father with visitation rights also enjoyed "joint parental responsibility," including the right "to make decisions for the child in personal matters" and issues "that affect the child's care." *Id.* (quoting *Furnes*, 362 F.3d at 714). The same is not true under Chilean law. Pet. App. 21a. Thus, the District Court concluded that "[u]nlike the father in *Furnes*, Mr. Abbott does not have statutorily protected rights to make decisions affecting [his son's] care" and the *ne exeat* order did not create "rights of custody" within the meaning of the Hague Convention. *Id.*

The Fifth Circuit affirmed. The Court reasoned that Mr. Abbott "possessed only rights of access to the child, and not rights of custody." Pet. App. 14a. The Court also noted that *Furnes* did not decide the same issue that this case presents because the Eleventh Circuit's opinion "refers to 'rights of custody' as derived from a *ne exeat* right in combination with rights of 'joint parental responsibility.'" Pet. App. 10a n. 7 (quoting *Furnes*, 362 F.3d at 720). Mr. Abbott, in contrast, could point solely to the *ne exeat* order,

which other Circuits had agreed created no "rights of custody." Pet. App. 6a.

REASONS FOR DENYING THE PETITION

The "intractable" conflict in U.S. law hypothesized by the Petition does not exist because no Circuit court or state court of last resort has held that a *ne exeat* clause standing alone constitutes "rights of custody" under Article 5(a) of the Convention. So while the Petition is correct that the Second, Fourth, Fifth, and Ninth Circuits stand together in answering "no" to the question presented, no Circuit or state has answered it "yes." This is not a conflict.

The Petition's attempt to conjure a split of authority depends on its argument that the Eleventh Circuit's *Furnes* decision irreconcilably conflicts with the prevailing view adopted here by the Fifth Circuit. But the ease with which the Fifth Circuit and the district court distinguished *Furnes* belies the argument. *Furnes* simply, and self-consciously, does not resolve the question presented. Without *Furnes*, the Petition has little to cling to by way of a split: three Circuit Court decisions that even Petitioner admits do not address the significance of *ne exeat* provisions under the Convention and three decisions of lower state courts that pre-date the first Circuit court decision addressing the issue, *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), and will therefore never be followed.

Absent the longed-for split among our own courts, the Petition takes on a different cast. The Court must intervene, Petitioner argues, because U.S. courts are out of step with the rest of the world on a question crucial to effective enforcement of the

Convention. But here again the Petition exaggerates. First, what Petitioner tries to portray as the monolithic view of the rest of the world is in reality a hodge-podge of decisions, some of which actually agree with the Fifth Circuit's conclusion, and others of which simply do not address the issue. Second, what Petitioner attempts to portray as a crucial question that threatens to undermine the entire Convention is in reality a narrow issue that affects few petitions for return filed under Article 12.

The arguments Petitioner puts forward in support of his interpretation of the Convention term "rights of custody" have been considered and rejected by the four Circuits to have decided the question presented in this Petition. And it is likely that the remaining Circuits will do the same because a *ne exeat* power cannot properly be characterized as a right of custody. The power of *ne exeat* can be employed in the service of both "rights of custody" (for which the Convention provides the remedy of return) and "rights of access" (for which it does not). But it replaces neither. Indeed, a parent can have the power of *ne exeat* without any custody rights at all. The Fifth Circuit – like the Second, Fourth, and Ninth before it – correctly analyzed the power of *ne exeat* as lacking the indicia of custody in and of itself and have declined to amend the Convention unilaterally in a manner inconsistent with its drafting and negotiation.

The Petition, properly scrutinized, demonstrates no compelling reason for this Court's involvement and should be denied.

I. The Handful Of U.S. Courts To Decide The Question Presented Have Done So Uniformly.

The Petition is premised on the hypothesis that the Circuits are "intractably divided" over whether a *ne exeat* provision in a statute or court order establishes "rights of custody" as that term is defined in Article 5(a) of the Convention. Pet. 7. The premise is flawed, however, because in reality the only four Circuits to resolve the question have done so the same way. The Petition is correct insofar as it posits that the Second Circuit was the first to decide this issue, holding in *Croll* that a *ne exeat* provision did not, in and of itself, confer "rights of custody" for purposes of the Convention. 229 F.3d 133, 139. And it is also correct insofar as it posits that the Ninth Circuit in *Gonzales v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), the Fourth Circuit in *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003), and now the Fifth Circuit in the instant case have elected to follow *Croll*. But the Petition is incorrect – and its hypothesis falls flat – when it proposes that other Circuits have held otherwise.

Petitioner's asserted Circuit split relies entirely on its characterization of the Eleventh Circuit's decision in *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), as contrary to the Second Circuit's holding in *Croll*. But *Furnes* is clear that its holding depends on additional rights granted to the petitioning parent under Norwegian law, not simply on the interpretation of a *ne exeat* provision. As the *Furnes* court stated, "Our case involves Norwegian law and is different from *Croll* because Plaintiff Furnes's *ne*

exeat right must be considered in the context of his additional decision-making rights by virtue of his joint 'parental responsibility' under Norwegian law." 362 F.3d at 719. Thus, while the *Furnes* court certainly criticized *Croll* in dicta, it recognized that its decision was ultimately distinguishable from, not contrary to, the Second Circuit's: "In contrast to the agreement in *Croll*, the Agreement here granted Plaintiff Furnes joint parental responsibility, which under the Norwegian Children Act granted Furnes the right to share decision-making authority with [the other parent]." 362 F.3d at 720. Unlike Petitioner, the Fifth Circuit and district court in the instant case recognized the fact that *Croll* and *Furnes* address different questions and easily distinguished *Furnes* on that ground. Pet. App. 12a.

With *Furnes* placed in its proper and intended context, Petitioner's proposed split vanishes. Indeed, the next argument – that three Circuits have "suggested" they would find a *ne exeat* provision to confer "rights of custody" (Pet. 12) – is thin on its face and becomes even thinner when one realizes that none of the cited cases seriously considered or even had cause to seriously consider the *ne exeat* question.

The Petition proposes that *Shealy v. Shealy*, 295 F.3d 1117 (10th Cir. 2002), "appeared to assume that violation of a *ne exeat* order would constitute a breach of 'rights of custody'...." Pet. 12. But *Shealy* never confronted the question of how to interpret a pure *ne exeat* clause at all. Rather, the court dealt with an order from a German court prohibiting the mother, a member of the U.S. military, from taking her child out of the country except in case of military necessity. 295 F.3d at 1120. Finding that military necessity

existed, the *Shealy* court concluded that the order was not violated on its own terms and that, as a result, the father's limited *ne exeat* rights were not violated. *Id.* at 1122-23. *Shealy* consequently never had to reach the question of whether a violation of *ne exeat* rights constituted a violation of "rights of custody" under Article 5(a). Tellingly, the *Shealy* court found *Croll* simply inapplicable. *Id.* at 1122.

Petitioner's attempt to glean support from the Seventh Circuit's decision in *Vale v. Avila*, 538 F.3d 581 (7th Cir. 2008), and the Sixth Circuit's decision in *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996) *(Friedrich II)*, is equally unavailing and for the same reason. *Vale* held that the petitioning parent had "rights of custody" under the Convention based on the right of *patria potestas* granted to both parents in the Venezuelan divorce decree, not based on *ne exeat* rights.[1] 538 F.3d at 586-87. Again, the question presented was never reached: "We need not decide whether the doctrine of *ne exeat* creates custody rights, for in none of the cases that answer the question in the negative did the plaintiff also have the right of *patria potestas*." *Id.* at 586; *see also id.* at 587 ("The rights and duties of *patria potestas* are so extensive that a parent given them is thereby denoted a fit custodial parent (as may not be the case when the parent is merely given the right of

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[1] *Patria potestas* is a doctrine descended from Roman law that continues to exist in a much-modified form in many civil law countries. *Vale*, 538 F.3d at 584, 587; *Whallon v. Lynn*, 230 F.3d 450, 456-59 (1st Cir. 2000). Though the details of the doctrine differ from country to country, it generally refers to a collection of rights and duties that both parents have with respect to the care and upbringing of the child.

ne exeat)....."). *Friedrich II* is even less relevant as the case did not even *involve* a *ne exeat* provision, resting instead on the straightforward conclusion that German law gave the petitioning father joint custody of the child at the time of removal. *Friedrich II*, 78 F.3d at 1064; *see also Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993) *(Friedrich I)*.

Finally, with no discernible conflict between circuits, Petitioner resorts to arguing that the Fifth Circuit's decision "cannot be reconciled with the decisions of three state courts...." Pet. at 13 (citing *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999), *cert. denied*, 531 U.S. 811 (2000); *David S. v. Zamira*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991); and *D'Assignies v. Escalante*, No. BD 051876 (Cal. Super. Ct. Dec. 9, 1991)). Petitioner's citation to three intermediate state courts underscores the fact no state courts of last resort have addressed the *ne exeat* question. Regardless, none of the decisions post-dates *Croll*, and the Petition offers no reason to think that state courts will interpret the Convention in contradiction to the holdings of four federal Circuit courts.

The Petition argues that the Court's intervention is necessary to heal a "division of authority [that] is considered, mature, and entrenched." Pet. 13. But the Petition fails to deliver any basis on which it could be concluded that such a split does or ever will exist. Since the Second Circuit decided *Croll* in 2000, every Circuit to address the question presented has decided it the same way, and there is no reason to think that the eight Circuits and fifty state courts of last resort that have yet to decide the question will do otherwise. Simply put, there is no conflict among

U.S. courts on the question presented that warrants this Court's intervention.

II. The Petition Inaccurately Portrays U.S. Courts As Out Of Step With The Rest Of The World On An Issue Critical To Enforcement Of The Convention.

The Petition next makes the in-vogue argument that the United States is out of step with the rest of the world on questions of international law. Other signatories to the Convention, says Petitioner, have uniformly held that *ne exeat* "rights" are "rights of custody," and U.S. courts are undermining the Convention by concluding otherwise. Pet. 17-24. Both prongs of this argument are greatly exaggerated. First, the "virtual consensus" among signatories to the Convention posited by the Petition does not exist. Second, the class of cases in which the question presented is dispositive is so narrow that any differences in how signatories choose to resolve it do not seriously threaten the Convention's effective enforcement.

A. Contrary To The Petition, There Is No Consensus Among Signatory Nations Regarding The Interpretation Of *Ne Exeat* Rights.

The Petition asserts that outside of the United States there is "virtual consensus in favor of treating *ne exeat* rights as rights of custody." Pet. 18. As a threshold matter, the assertion of "consensus" is difficult to square with the fact that, even according to Petitioner's own tally, courts in just eleven of the eighty-one signatories to the Convention have

considered the question and the fact that two of those countries' courts – including the Supreme Court of Canada – have *agreed* with the conclusion reached by the Fifth Circuit in this case. Even putting that aside, Petitioner's claim of uniformity ignores the complex reality of the foreign jurisprudence that does exist. In reality, few signatories have finally resolved whether *ne exeat* rights amount to rights of custody under the Convention, with many of the cited decisions coming from lower courts and/or turning on factors other than the interpretation of *ne exeat* provisions. Consequently, even if a "consensus" among foreign courts justified this Court's intervention – a proposition the Petition fails to establish – no such consensus has been established.

First, the Petition glosses over the fact that the Supreme Court of Canada has twice concluded that a *ne exeat* right is *not* in and of itself sufficient to constitute "rights of custody" under the Convention. In *Thomson v. Thomson,* [1994] 3 S.C.R. 551 (Can.), the Court, looking to the text and drafting history of the Convention, refused to hold that the "Convention applies to every case where a child is removed from one country to another where a court order prohibits it." *Id.* ¶ 50. Accordingly, the Court concluded that a Scottish court's interim order granting the father access rights and containing a *ne exeat* provision did not vest the father with "custody rights" sufficient to compel the child's return to Scotland under the Convention. *Id.* ¶ 68. The Court observed that *ne exeat* provisions are intended to ensure access and are "not intended to be given the same level of protection by the Convention as custody." *Id.* ¶ 69. The Canadian Supreme Court's decision is not dicta,

as Petitioner suggests; it definitively rejected the father's Convention claim on this basis. *Id.* ¶ 77. The fact that there was an alternative basis under Canadian law to order return of the child does not transform the decision on the Convention claim into dicta.

The Canadian Supreme Court reached a similar conclusion again two years later in *D.S. v. V.W.*, [1996] 2 S.C.R. 108, ¶¶ 75-77 (Can.). This time the Court noted that the Convention "cannot be interpreted in a way that systematically prevents the custodial parent from exercising all the attributes of custody, in particular that of choosing the child's place of residence, but, on the contrary, must be interpreted in a way that protects their exercise." *Id.* ¶ 33. In light of this intention, the Court held, a reading of the Convention that would allow a parent who merely holds access rights protected by a *ne exeat* order to compel return of the child "would contradict the very object of the [Convention], namely to protect rights of custody and the exercise of the attributes thereof, including the choice of the child's place of residence." *Id.* ¶ 38.

Petitioner's response to this authority is to argue that there is doubt regarding whether these two decisions represent the view of Canadian courts. That argument should be accorded the same weight as an argument that two decisions of *this* Court do not represent *its* views. But even if there was doubt, that doubt would still undermine, not repair, the "consensus" on which Petitioner's argument relies. The same is true of the divergent opinions of the French courts, which the Petition reluctantly acknowledges. *Compare Ministere Public v. Mme. Y.*,

Tribunal de grande instance [T.G.I.][ordinary court of original jurisdiction] Périgueux, Mar. 17, 1992, D.S. Jur. 1992 (Fr.) (concluding that a *ne exeat* provision in the custody arrangement did not create custody rights when petitioner had only access rights) *with Ministre Public c. MB,* Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, Mar. 23, 1989, *reprinted in* 79 Rev. crit. 529 (1990) (an intermediate appellate court concluding that a *ne exeat* order does create rights of custody).

Second, only seven out of the twenty-one foreign cases cited by Petitioner are judgments by the highest court of those nations, and three of those are from Canada. *See M.S.H. v. L.H.,* [2000] 3 I.R. 390 (Supreme Court of Ireland); *Sonderup v. Tondelli,* 2000 (1) SA 1171 (CC) (S. Afr.); Bundesverfassungsgericht [BVerfG] [Fed. Const. Ct.] July 18, 1997, 2 BvR 1126/97 (F.R.G.); *D.S. v. V.W.,* [1996] 2 S.C.R. 108 (Can.); *Goertz v. Gordon,* [1996] 2 S.C.R. 27 (Can.); *Thomson v. Thomson,* [1994] 3 S.C.R. 551 (Can.); Oberster Gerichtshof, [OGH] [Supreme Court] Feb. 05, 1992, 2 Ob 596/91 (Austria). The remainder of the cases cited are from family courts, trial courts, or intermediate courts of appeal. *See, e.g., In re Marriage of Jose Garcia Resina and Muriel Ghislaine Henriette Resina,* Appeal No. 52, 1991 (Fam.) (Austl.) (decision from Australian Family Court); *C. v. C.,* [1989] 1 W.L.R. 654 (Eng. C.A.) (decision from English intermediate appellate court); *Secretary for Justice v. Abrahams,* Family Court at Taupo, Sept. 3, 2001 (N.Z.) (decision from New Zealand family court). As a result, Petitioner's contention that signatory countries have *decided* the question presented is overstated.

Third, even if the cited cases could be interpreted as articulating the view of the nations in which they were decided, a number of them would not be relevant because of differences in the rights asserted. In the New Zealand case on which Petitioner relies, for example, the "custody rights" of the petitioning parent consisted not just of a *ne exeat* order but also co-guardianship granted by the South African court order. *Secretary for Justice v. Abrahams*, Family Court at Taupo, Sept. 3, 2001 (N.Z.) (explaining that the custody rights vested in the mother of children produced in an Islamic marriage as a matter of South African law survive in any subsequent court order modifying custody).

The South African case of *Sonderup v. Tondelli*, 2000 (1) SA 1171(CC) (S. Afr.), also does not support Petitioner's claim of a conflict. The *Sonderup* court ordered a child's return on the basis of an *interim* custody agreement between the parties in which they agreed that respondent would return to finalize the issues of custody and access. *Id.* ¶ 24; *see also M.S.H. v. L.H.*, [2000] 3 I.R. 390 (ordering the return of children removed during pending custody proceedings). The South African court explicitly distinguished the case from one in which a final custody order has been entered and specifically stated that it did not find the English appellate court in *C. v. C.*'s adoption of Judge Sotomayor's approach in *Croll* persuasive because the facts in *Croll* were inapposite. *Id.* The case Petitioner cites from the German Federal Constitutional Court is not on point either. Pet. 20. There, the German Court held that the petitioner had "rights of custody" under the Convention because under Argentinean law he had

the right to jointly decide questions relating to health, education, the child's emancipation and right to marry, and the child's ability to join defense or security forces. Bundesverfassungsgericht [BVerfG] [Fed. Const, Ct.] July 18, 1997, 2 BvR 1126/97, ¶¶ 13-15 (F.R.G.).

Finally, it should also be noted that even if foreign decisions did uniformly contradict the Fifth Circuit's rule, this would not require the Court to grant the Petition, much less reverse. While sister signatories' jurisprudence is "entitled to considerable weight" in interpreting treaty provisions, *Air France v. Saks*, 470 U.S. 392, 397 (1985), it is far from dispositive. The Court has made plain that the interpretation of a treaty does and must derive primarily from the ordinary meaning of its text. *See Medellín v. Texas*, 128 S. Ct. 1346, 1357 (2008); *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988); *Air France*, 470 U.S. at 397. If that text is ambiguous, it may then be necessary to look to other sources; however, even then the drafting history and intent of the signatory parties should be accorded more weight than any sister signatories' judicial interpretation. *Chan*, 490 U.S. at 134; *see also Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-35 (1991); *Volkswagenwerk*, 486 U.S. at 700. Thus, while the Petitioner suggests that the Fifth Circuit should have deferred to the decisions of foreign courts as a matter of course, this Court has rarely resolved questions of treaty interpretation with reference to foreign case law, and where it has done so, it has hesitated to follow the

opinions of intermediate appellate courts and emphasized that distinguishing factual circumstances must be carefully considered. *Olympic Airways v. Husain*, 540 U.S. 644, 655 n. 9 (2004).

B. The Petition Exaggerates The Significance Of The Question Presented.

The Petition's foreign-jurisdiction argument is flawed for another reason. Even if there were consensus among foreign courts that a *ne exeat* prohibition is a "right of custody," the fact that U.S. courts have concluded otherwise would not threaten the effective enforcement of the Convention. To read the Petition one would think that every wrongful removal petition filed under the Convention turns on a *ne exeat* provision. But as the discussions of U.S. and foreign case law above illustrate, the resolution of such petitions depends more often on other factors, including the details of the particular divorce decree or court order at issue, unique foreign statutes, or the affirmative defenses that the Convention provides. As a result, resolution of the question presented would affect only a narrow class of cases.

The cases cited in the Petition aptly illustrate the diverse range of factors that bear on whether a petition for removal is granted. *Shealy*, for example, turned exclusively on whether the district court had correctly decided that the mother, a member of the U.S. military, had left Germany because of "military necessity." *Shealy*, 362 F.3d at 1123. *Vale*, 538 F.3d at 586, and *Whallon v. Lynn*, 230 F.3d 450, 459 (1st Cir. 2000), turned on the current meaning ascribed to the ancient doctrine of *patria potestas*. And

Friedrich II turned on whether the father's contact with the son was sufficient to constitute the active "exercise" of his legal custody rights for purposes of the Convention. 78 F.3d at 1064. A petition for removal is also subject to four affirmative defenses, including that there is a risk of physical or psychological harm to the child or that return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Convention arts. 12, 13a, 20; 42 U.S.C. § 11603(e)(2)(A),(B). As a result, the number of legal and factual circumstances that can arise is dizzying and, as the Petition betrays, albeit unintentionally, it is a rare case indeed that will turn on the existence of a *ne exeat* order. Significantly, the Petition does not suggest that U.S. courts are out-of-step with other countries on these issues or that the United States is considered to be an ineffective or reluctant enforcer of the Convention.

III. This Case Is A Poor Vehicle For Resolving The Question Presented Because The *Ne Exeat* Provisions of Chilean Law Vest No Rights In The Father.

While the *ne exeat* laws of other countries may sometimes grant a noncustodial parent the right to veto whether a child may be taken abroad, Chilean law does not. Thus, this case is a poor vehicle for resolving any purported conflict in authority.

Chilean law vests the power of veto only in the family court. The requirement that a custodial parent seek authorization from a parent with visitation rights is simply a mechanism to avoid invocation of the court's jurisdiction where there is no

dispute over the interests of the child or the abridgement of visitation rights. But denial of consent does not equate to veto of the departure of the child; it simply makes the custodial parent go to court to seek approval, whereupon the family court will determine if "good reason" exists to prevent the departure. Minors Law 16,618 of Chile, art. 49 (Pet. App. 62a). The *ne exeat* order of the Chilean court in this case has the same effect. *Id.* Because under Chilean law it is the family court, and not the parent with visitation rights, that holds the power to veto the custodial parent's departure decisions, this Court cannot resolve the question presented in any way that will meaningfully affect the development of law interpreting the Convention.

Furthermore, this Court's resolution of the question presented will not affect the ultimate outcome of the case. To begin, the Petitioner's claim is subject to a defense of *res judicata* because the same issue – the return of the Abbotts' son to Chile – between the same parties has been finally adjudicated by the Hays County court. Pet. App. 17a. The District Court has yet to reach the issue. Pet. App. 25a. The District Court has also never reached the question of whether Petitioner was actively "exercising" any "rights of custody" he may have had at the time of removal. This is an element of a return claim that Petitioner must prove by a preponderance of the evidence. 42 U.S.C. § 11603(e)(1)(A). And any re-opening of the fact-finding process will potentially

implicate subsequent events such as the Abbotts' son's intervening attainment of the age of consent.[2]

IV. Further Development Is Required On The Question Of Whether And How A *Ne Exeat* Right Can Be Continuously "Exercised" As A Right of Custody At The Time Of Removal.

Even if *ne exeat* rights were at issue here, the decisional law is too undeveloped at this time to warrant the Court's intervention. Petitioner attempts to formulate the question presented as a simple exercise in parsing definitions. He contends that if a parent has the right, pursuant to a *ne exeat* provision, to prevent a child from leaving the country, the parent thereby holds a "right to determine the child's place of residence," which is an element of a "right of custody" mentioned in the Convention. Convention art. 5. But the question presented cannot be fully answered by such a simple analysis.

An applicant for a return order under the Convention must show not merely that he possessed

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[2] Article 13 of the Convention provides that the court "may also refuse to order the return of the child if it finds that the child objects to being returned and has obtained an age and degree of maturity at which it is appropriate to take account of its views." Section 153.008 of the Texas Family Code provides that "[a] child 12 years of age or older may file with the court in writing the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child, subject to approval by the court." *See also* TEX. FAM. CODE ANN. § 153.009 (Vernon Supp. 2008). (requiring court to interview child 12 or older upon proper application to determine his wishes with respect to residence). The Abbotts' son is now 13. Pet. App. 1a.

custody rights, but also that he was "exercising the custody rights at the time of removal or retention." Convention art. 13. Thus, "rights of custody" are necessarily rights that can be actively and contemporaneously exercised at the time of removal. *Ne exeat* "rights" cannot meet that definition.

Consent to a child's departure from his country of residence pursuant to a *ne exeat* prohibition does not always involve residence decisions, for example when the child is taken abroad for family visits, vacations, or health care. Consequently, the exercise of a *ne exeat* right is not coextensive with the exercise of the "right to determine the child's place of residence" (Convention art. 5), and thus does not always involve the exercise of custodial rights under any definition. Indeed, even if *arguendo* a *ne exeat* right sometimes operates as a custodial right when residence is at issue, the exercise of *ne exeat* rights would constitute the exercise of custodial rights at the time of removal only in rare circumstances: *i.e.*, when the custodial parent seeks to establish a new residence for the child, and the non-custodial parent withholds consent to establishment of the new residence.

The necessity for active, contemporaneous exercise confirms that *ne exeat* rights are not "rights of custody" within the meaning of the Convention at all. It is inconceivable that the Convention intended the wrongfulness of a child's removal or retention, and the remedy of mandatory return, to depend on such a rare happenstance as when consent is specifically withheld from a request to establish an extrajurisdictional residence.

Neither the Petition nor the cases on which it relies attempt to reconcile the unique character of *ne exeat* rights with the Convention's core requirement that the applicant be actively "exercising" his custodial rights "at the time of removal" in order to have a return remedy. This Court should await further development of the law, in which courts deal directly with these intertwined questions. It should not resolve the misleadingly simplified question presented in the Petition.

V. The Fifth Circuit Correctly Concluded That A *Ne Exeat* Right, Standing Alone, Does Not Trigger The Hague Convention's Remedy Of Return.

Petitioner contends that certiorari is further warranted because the Fifth Circuit's decision is incorrect. However, the various arguments Petitioner puts forward in support of that proposition have now been rejected by four Circuit courts, of which the Fifth Circuit is just the most recent. The Fifth Circuit's interpretation of the Convention is consistent with this Court's jurisprudence and is correct.

The ordinary meaning of a treaty's text is the primary source for interpretation. *Medellín v. Texas*, 128 S. Ct. at 1357; *Chan*, 490 U.S. at 134; *see Air France*, 470 U.S. at 396-400. The records of drafting and negotiation are also helpful to "elucidate" the meaning of that text. *Chan*, 490 U.S. at 134; *Air France*, 470 U.S. at 400. If the text is not clear, the primary sources to which the Court looks are the context in which the words were written and the intent of the parties at the time of negotiation.

Eastern Airlines, 499 U.S. at 534-35; *Chan*, 490 U.S. at 134; *Volkswagenwerk*, 486 U.S. at 699. Where, as here, the treaty's text and drafting history are clear, the Court need not look to post-ratification interpretations of other contracting parties such as the Special Commission Proceedings heavily cited in the Amicus Brief filed by the Hague Conference. *See Eastern Airlines*, 499 U.S. at 534-35; *Volkswagenwerk*, 486 U.S. at 700 (other rules of construction are only necessary for "difficult" passages).

The Convention explicitly defines the difference between "rights of custody" and "rights of access." Convention art. 5. The drafters intentionally created the clear distinction between the two sets of rights, and they are thus treated quite differently by the Convention. Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ("*Perez-Vera Report*"), *in* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTES ET DOCUMENTES DE LA QUARTORZIEME SESSION, TOME III, p. 428, 443 (1980).[3] The Chilean custody order granted to Petitioner "the right to take a child for a limited period of time to a place other than the child's habitual residence," which falls squarely within the Convention's definition of "rights of access." Convention art. 5(b).

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[3] *See Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10494, 10503 (1986) ("[Professor Perez-Vera's] explanatory report is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it.").

Holders of custody rights are entitled to a special remedy whenever a "wrongful removal" of a child occurs, namely, the return of the child to the nation of his or her habitual residence. Convention art. 12. A removal is "wrongful" under the terms of the Convention only if it violates "rights of custody." Convention art. 3. Removal of a child that interferes with "rights of access" is not "wrongful" and therefore the Article 12 remedy does not attach. The majority view of Convention drafters, and that adopted in the final version of the Convention, was that a breach of access rights, "especially where the child was taken abroad by its custodian," was not within the category of wrongful removals that the Convention seeks to prevent. *Perez-Vera Report* at 445.

A proposal to extend Article 3's protection to holders of "rights of access" was considered and overwhelmingly rejected during Convention negotiations. *Procès-verbal No 3 in* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTES ET DOCUMENTES DE LA QUARTORZIEME SESSION, TOME III, p. 263, 267 (1980). In the view of one delegate, "the purpose of article 3 was to protect custodial parents against the wrongful removal of children, whereas the purpose of article 17 [later article 21] was to protect non-custodial parents who possessed rights of access which had been breached by the custodial parent." *Id.* at 266. Access rights are afforded some protections under the Convention, *see* art. 21, but the Article 12 right of return is not one of them. The Fifth Circuit correctly relied on this distinction between custody rights and access rights. Pet. App. 14a.

The Petition places great weight on the comments of two delegates who, in discussion of this failed proposal, opined that access rights coupled with a *ne exeat* clause would qualify for the Convention's protections. Pet. 31. It mischaracterizes the discussion by claiming that "participants agreed" that the child would have to be sent back in such a situation, when in reality the statements only amount to comments by two individual delegates, in support of a proposal that was overwhelmingly rejected by the majority of negotiating parties. *Procès-verbal No. 3* at 266.

Because it is clear that access rights do not entitle the Petitioner to Article 12's remedy, he argues that the *ne exeat* provision in the Chilean court's order alone grants him the requisite "rights of custody." However, both the Convention's text and its negotiating history lead to the conclusion that a *ne exeat* clause alone does not fall within the rights protected by the Convention's remedy for wrongful removal.

Both the consistent language and the drafting history make it clear that the drafters considered custody rights as plural, a cluster of rights amounting to the right to care for and protect a child. Both the *Croll* court and the Fifth Circuit below accurately recognized this concept. *Croll*, 229 F.3d at 138-39; Pet. App. 7a-8a. The Convention never once refers to a singular "custody right," but speaks only of "rights of custody." The "right to determine the child's place of residence" is only one specific right contained within that cluster: it is a "particular" manifestation of the broader right to care for the child. It is especially noted in Article 5's definition of custody

rights because it directly relates to the central object and purpose of the Convention, which is to protect custodial parents from violation of their custodial rights by illegal removal of the child from the residence they chose. *Perez-Vera Report* at 451-52. Article 5 "includes" the right to determine residence within the definition of custody rights, but in no way does it indicate that veto power under a *ne exeat* provision alone rises to the level of rights that are protected by the prohibition on wrongful removal.

Furthermore, as the Fifth Circuit and *Croll* correctly recognized, consent power under a *ne exeat* provision do not empower an access-rights holder to "determine a child's residence." At most, that parent simply has the opportunity to veto a choice of residence independently made by the custodial parent. Pet. App. 8a; *Croll*, 229 F. 3d at 139-40. The power to frustrate the custodial parent's exclusive right to determine residence is not the same as a shared custody right. Accordingly, the Chairman of the Hague Conference at the time of the Convention's negotiation has since publicly stated that Article 5's definition of custody rights should not include "a right simply to give or to withhold consent to changes in a child's place of residence." A. E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L. Q. 537, 546 (July 1981).

Petitioner has provided the Court with cherry-picked passages from the negotiating history in an attempt to portray the Convention's purpose broadly and vaguely enough so that it can include his position. In reality, however, the primary object and purpose of the Convention is simple and clearly established in the travaux preparatoires. At the

"head of [the] objectives" of the Convention is "the restoration of the *status quo*;" in other words, to prevent "conduct...which changes the family relationships which existed before or after any judicial decision, by using a child and thus turning it into an instrument and principal victim of the situation." *Perez-Vera Report* at 429, 442. The drafters specifically had in mind a situation where the abductor disturbed the status quo of the child's existing custodial relationship by, for example, unlawfully retaining the child during a period of temporary residence with a non-custodial parent who holds access rights. *Id.* at 429-30, 442.

To recognize a *ne exeat* clause as worthy of Article 12's protections would in fact run directly contrary to this primary objective. In most cases, including the one at hand, a parent or other individual that has been awarded access rights along with a *ne exeat* clause has already been determined unfit to exercise custody rights over the child by a court in his or her own nation of habitual residence. To allow such an individual to demand return of the child to a country from which the custodial parent has left and, in many cases, will not be permitted to return, flies in the face of the drafters' intent. The position Petitioner espouses destroys, rather than protects, the status quo of the existing custodial relationship, and fails to treat the child's interests as "of paramount importance." Convention, pmble.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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REPLY BRIEF

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TIMOTHY MARK CAMERON ABBOTT,

Petitioner,

v.

JACQUELYN VAYE ABBOTT,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONER

Respondent's Brief in Opposition is as notable for what it fails to address as for what it does say. For the reasons described in this reply brief, the arguments respondent advances are unavailing. However, respondent fails almost entirely to address the arguments made in the *amicus* brief filed by the Permanent Bureau of the Hague Conference on Private International Law. That failure is telling, as the Permanent Bureau – which, as it explains in its *amicus* brief, is the institution "responsible for monitoring and reviewing the practical operation of the" Hague Convention "and for promoting its effective implementation in States Parties" – contends that the Fifth Circuit's decision was erroneous and also emphasizes the need for uniformity in the interpretation of the Convention and the importance of the question presented. The *amicus* brief thus confirms what the petition had already shown: certiorari is warranted to review this important question, which is often determinative of parental rights involving children who are taken from their home countries.

1. Respondent first contends that certiorari is not warranted because there is no division among the courts of appeals regarding whether a ne exeat right constitutes a "right of custody" for purposes of the Convention. Respondent's assertion that there is no division among the circuits is simply wrong, as is her characterization of the decision below as having "easily distinguished," BIO 11, *Furnes*. To the contrary, the Fifth Circuit itself recognized that the courts of appeals are divided on the question

presented: in a section entitled "The Circuit Split," Pet. App. 6a, that court explained that "[t]he Eleventh Circuit . . . held that a *ne exeat* right alone is sufficient to constitute a custody right," *id.* 10a.

The Eleventh Circuit's opinion in *Furnes* confirms that the Fifth Circuit's characterization of that decision is the correct one. To be sure, the Eleventh Circuit's opinion acknowledges that other provisions of Norwegian law "may well grant [a parent] a 'right of custody.'" 362 F.3d 702, 714 (11th Cir.), *cert. denied*, 543 U.S. 978 (2004); *see also* 362 F.3d at 714 (indicating that a ne exeat right, "especially in the context of [the father's] retained rights under" Norwegian law, "constitutes a 'right of custody' as defined in the Convention"). However, the Eleventh Circuit's opinion makes clear that a ne exeat right, standing alone, constitutes a "right of custody" for purposes of the Convention. Thus, for example, the Eleventh Circuit characterized the question before it as "whether the *ne exeat* right amounts to 'the right to determine the child's place of residence.'" *Id.* It concluded that "this *ne exeat* right grants Plaintiff Furnes a right of custody under the Hague Convention." *Id.*; *see also id.* at 716 ("[T]he *ne exeat* right [created by Norwegian law] provides Furnes with a right of custody . . . as defined by the Hague Convention."); *see also id.* at 719 n.14 (observing that "[a]t least one state court has determined, as we do, that custody rights are created by *ne exeat* clauses") (citation omitted).

Further confirmation that the Fifth Circuit correctly understood that its approach conflicts with *Furnes* can be found in the decisions of the district courts in the Eleventh Circuit, which have

characterized the decision in *Furnes* as holding that a ne exeat right does constitute a right of custody for purposes of the Convention. *See, e.g.*, *Lalo v. Malca*, 318 F. Supp. 2d 1152, 1156 (S.D. Fla. 2004) ("In *Furnes*, the Eleventh Circuit . . . held that a *ne exeat* right does constitute a right of custody."); *Garcia v. Angarita*, 440 F. Supp. 2d 1364, 1378 (S.D. Fla. 2006) ("In *Furnes*, the Court expressly ruled that Petitioner's right under Norwegian law to prohibit the child from living abroad, constituted a 'right of custody' within the meaning of the Hague Convention."); *Pasten v. Velasquez*, 462 F. Supp. 2d 1206, 1210 (M.D. Ala. 2006) ("In interpreting the Hague Convention, the Eleventh Circuit has held that violation of the *ne exeat* right is enough to qualify as a violation of custody rights."). These cases are particularly telling because they are the best indication that petitioner's case would have been decided differently in the Eleventh Circuit.

2. Respondent asserts that certiorari is also not warranted because there is no consensus among signatory states regarding the question presented. That argument rests in large part on respondent's quibbling about the details of a few foreign decisions cited in the petition, *see* BIO 18-19, without challenging petitioner's (or the Permanent Bureau's) characterization of the majority of the foreign decisions. More importantly, respondent's argument is belied by the Permanent Bureau's brief, which agrees with petitioner (at 8) that "a broad positive consensus has developed among Contracting State[s] on the question of whether a *ne exeat* provision may give rise to a 'right of custody' under the Convention."

Respondent also asserts that "[e]ven if there were consensus among foreign courts that a *ne exeat* prohibition is a 'right of custody,' the fact that U.S. courts have concluded otherwise would not threaten the effective enforcement of the Convention." BIO 20. Even if that assertion were correct, the present circuit split undermines the explicit congressional goal of a "uniform international interpretation of the Convention." 42 U.S.C. § 11601(b)(3)(B). But as the Permanent Bureau recognizes (at ii), that assertion is not correct: because the decision below "is inconsistent with decisions adopted by courts in many other States Parties, it may have adverse effects on the operation of the Convention more generally."

Nor is there any merit to respondent's assertion that "resolution of the question presented would affect only a narrow class of cases." BIO 20. Ne exeat clauses are widely used "to regulate post-separation, divorce and other custodial arrangements," Perm. Bureau *Amicus* Br. i-ii, and – as the myriad cases cited in the petition and the *amicus* brief demonstrate – the question presented has arisen in a number of cases both in the United States and abroad since the Convention was ratified. Respondent's suggestion that the significance of the question presented might somehow be diminished because a "diverse range of factors . . . bear on whether a petition for removal is granted," BIO 20, is puzzling, because (as respondent herself notes, *see id.* 11-13) the cases she cites do not directly address the question presented. Similarly, although respondent correctly notes that "[a] petition for removal is also subject to four affirmative defenses," *id.* 21, those

affirmative defenses only come into play once the parent seeking a child's return has established that the child's removal was wrongful, *see Garcia*, 440 F. Supp. 2d at 1377; *see also Furnes*, 362 F.3d at 723.

3. Contrary to respondent's assertion (BIO 21-22), this case is an ideal vehicle to consider the question presented. First, respondent's contention that "under Chilean law it is the family court, and not the parent with visitation rights, that holds the power to veto the custodial parent's departure decisions" is erroneous. Minors Law 16,618 of Chile makes clear that once a parent has visitation rights, that parent's written permission is required before the child may leave the country. *See* Pet. App. 61a-62a. Although the court may give the parent seeking to take the child out of the country permission to do so in limited circumstances – if parental consent "cannot be granted or is denied without good reason," *id.* 62a – such a provision does not "vest[] the power of veto *only* in the family court," BIO 21 (emphasis added).

Indeed, neither of the lower court decisions in this case agreed with respondent's characterization of the ne exeat right; instead, both rested only on the premise that the ne exeat right merely provided petitioner with "a veto right over his son's departure from Chile" but did not constitute a "right of custody" under the Convention. *See, e.g.*, Pet. App. 13a; *id.* 22a-23a. Moreover, other cases have considered similar provisions without suggesting that the veto power rested only in the court, *see, e.g.*, *Croll v. Croll*, 229 F.3d 133, 135 (2d Cir. 2000) (ne exeat clause provided that child "'not be removed from Hong Kong until she attains the age of 18 years' without leave of

court or consent of the other parent"), *cert. denied*, 534 U.S. 949 (2001); *Pasten*, 462 F. Supp. 2d at 1210-11 (construing identical Chilean statute as a *father's* ne exeat right). And in any event, respondent does not explain how a ne exeat right such as the one at issue in this case would be materially different from a ne exeat right in a custody agreement that does not expressly authorize the court to allow the child's removal absent parental consent; in such a scenario, the parent seeking to take the child out of the country could simply go to court to seek permission and/or a revision to the custody agreement.

Second, respondent's attempt to raise the specter of a res judicata claim should not preclude this Court from granting certiorari. As petitioner's trial brief in the district court (which is reprinted in part in an appendix to this brief) explains, that claim is meritless. *See* Reply App. 2a-4a. But in any event, at most the issue would remain open on remand from this Court, as neither the district court nor the Fifth Circuit has ever addressed it.

4. Respondent also argues that this case is not a good vehicle because the district court never "reached the question of whether Petitioner was actively 'exercising' any 'rights of custody' he may have had at the time of removal," BIO 22, and that in any event the Court should await "further development of the law" dealing with the purportedly "intertwined" questions of ne exeat rights and the "actively exercising" requirement. Both of these arguments are straw men.

First, as respondent acknowledges, the district court has never determined whether petitioner was actively exercising his right to custody. However,

even if respondent has not waived this argument by failing to address it either in her trial brief or at trial, the question can easily be resolved on remand.

Second, no further development of the law is necessary. Article 3(b) of the Convention requires a parent seeking return of a child to demonstrate that his rights of custody were "actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." *See* Pet. App. 28a. This case is on all fours with the Eleventh Circuit's decision in *Furnes*, which deemed it "clear that Plaintiff Furnes would have exercised his custody rights under the *ne exeat* clause . . . but for [his child's] removal." That court reasoned that the mother was required to seek the father's consent before relocating outside of Norway with the child: "Had [she] complied with that obligation, Furnes would have exercised his right by either consenting to the relocation (with or without conditions) or withholding consent." 362 F.3d at 723.

And in any event, there is no need "to reconcile the unique character of *ne exeat* rights with the Convention's core requirement that the applicant be actively 'exercising' his custodial rights," BIO 25, because the two questions are *not* intertwined. To the contrary, Article 3 makes clear that the inquiry into whether a right of custody has been breached (which necessarily includes a determination whether a right of custody exists) is entirely separate from the determination whether that right was being, or would have been, exercised. *See* Pet. App. 28a.

5. Finally, respondent contends that certiorari is not warranted because the Fifth Circuit's decision is correct. Respondent begins by emphasizing that

"[t]he Convention explicitly defines the difference between 'rights of custody' and 'rights of access,'" and explains that "[a] proposal to extend Article 3's protection to holders of 'rights of access' was considered and overwhelmingly rejected during Convention negotiations." BIO 26-27. But that argument is circular: the very issue in this case is whether a ne exeat right is a right of custody.

Turning to the merits of the actual question presented, respondent first contends that a "*ne exeat* clause alone does not fall within the rights protected by" the Convention's wrongful removal remedy because "the drafters considered custody rights as plural, a cluster of rights amounting to the right to care for and protect the child." BIO 28. Notably, although respondent quibbles with the portions of the drafting history on which petitioner relies, she does not seriously dispute the three Special Commission reports issued since the Convention's ratification which have confirmed that a ne exeat right *does* constitute a right of custody for purposes of the Convention.[1] *See* Perm. Bureau *Amicus* Br. 12-14 (quoting Report of the Third Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Mar. 1997) and Report on the Second Meeting of the Special

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[1] Although respondent describes a "clear distinction" between rights of custody and rights of access, it is hardly clear that a ne exeat right alone does not constitute a "right of custody," such that the Special Commission reports are rendered irrelevant. *Contra* BIO 26.

Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Jan. 1993)); Pet. 22 (citing Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention, 29 I.L.M. 219, 223 (Oct. 26, 1989)).

Respondent next argues that the consent power created by a ne exeat right merely serves as a veto power. BIO 29. But this argument is equally unavailing. First, as the petition explained (at 26-27), a ne exeat right does in fact give a parent significant leverage over where the child lives and therefore does effectively determine the country in which the child will live. Second, and in any event, the 1997 Special Commission Report (cited in Perm. Bureau *Amicus* Br. 13-14) specifically observed that, for purposes of Article 5, "rights of custody" were "deemed to cover cases where a parent had rights of access and the right to be consulted before a change of the child's place of residence" – *i.e.*, a veto power. Third, the personal views of A.E. Anton provide little support for respondent's position: as the petition explains (at 32-33), Anton's statement is far less definitive than respondent would have this Court believe, but in any event there is no reason to accord any weight to those personal views when the Permanent Bureau has expressed a contrary official view.

Respondent's final argument is that recognizing a ne exeat right as a "right of custody" for purposes of the Convention would "run directly contrary to th[e] primary objective" of restoring the status quo. BIO 30. In this case, respondent has avowedly flouted a

court order and a statute in removing petitioner's child from Chile without his permission, and for over three years has frustrated petitioner's attempts to have his son returned to Chile. For her now to argue that a ne exeat right should not constitute a right of custody because returning A.J.A. to Chile would "destroy[] . . . the status quo of the *existing* custodial relationship" (emphasis added) literally turns the Convention and its objectives on their head.[2] As Elisa Perez-Vera explains, "the desire to guarantee the re-establishment of the *status quo* disturbed by the actions of the abductor has prevailed in the Convention," which "rests implicitly upon the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal." Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention, in* ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 430 (1980). Requiring the return of a child, such as A.J.A., who has been removed from his country of habitual residence in violation of a ne exeat right would be fully consistent with the objectives of the Convention, as it would allow the courts of that country to make any decisions

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[2] In any event, requiring A.J.A.'s return to Chile would not necessarily disrupt his existing custodial relationship with respondent. Respondent has never asserted that she cannot return to Chile; if she were to return, the Chilean courts could resolve the ongoing custody dispute with petitioner, which might or might not alter her custodial relationship with A.J.A.

regarding the merits of the custody dispute between petitioner and respondent.[3]

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition and the *amicus* brief of the Permanent Bureau, certiorari should be granted.

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[3] Respondent's suggestion (at 30) that petitioner "has already been determined unfit to exercise custody rights over the child by" a Chilean court is blatantly false. As the petition explained (at 4 n.1), Chilean law vests responsibility for the personal care of a child with the mother unless the father demonstrates that the mother is unfit; there is no implication that the father is an inadequate parent.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

No. A-06-CA-359-LY

TIMOTHY MARK CAMERON ABBOTT, Petitioner

v.

JACQUELYN VAYE ABBOTT

PLAINTIFF'S TRIAL BRIEF

Plaintiff Timothy Mark Cameron Abbott hereby submits his Trial Brief in the above entitled and numbered cause, which is set for trial before the Court on February 16, 2007:

* * *

STATEMENT OF FACTS

6. A.J.A., Jackie and Tim resided continuously for more than 3 years at La Serena, Chile, near which Tim was employed as an astronomer at an observatory. Their place of habitual residence was in Chile. Jackie and Tim began to live separately at La Serena in March of 2003. Subsequently, there was extensive litigation in the Chilean family courts concerning care and control of A.J.A., access between A.J.A. and his father, and child support; the Chilean courts issued rulings on all of these matters. In July of 2005 Tim initiated a suit against Jackie seeking a protective order in favor of A.J.A.

7. On or about August 26, 2005, Jackie removed A.J.A. from Chile to the USA, without informing Tim in advance or obtaining the consent of Tim or of a Chilean court. After locating Jackie and finding out that she lived in Dripping Springs, Tim instituted a suit in the 274th Judicial District Court of Hays County, Texas, under the Uniform Child Custody Jurisdiction and Enforcement Act (Texas Family Code, Chapter 152) seeking an order enforcing a Chilean order for access which included provision for A.J.A. to be with Tim during the entire month of February. The court denied the request for A.J.A. to return to Chile for such access, but ordered visitation in Texas after school and on weekends from February 13, 2006 (the date of the court's decision announced from the bench) until Tim had to return to Chile (which was on February 25th).

* * *

AFFIRMATIVE DEFENSES

24. In her FIRST AMENDED ORIGINAL ANSWER, filed on the deadline date of December 1, 2006, Defendant (in paragraph 6) for the first time raised a defense based on a claim of *res judicata*. Specifically, Defendant asserts "that the identical issues presented by Plaintiff in this proceeding have already been considered by the Texas district court" and that an order filed in the Cause No. 06-0146 in the 274th Judicial District Court of Hays County, Texas, on March 27, 2006, bars this suit "under the doctrine of *res judicata* from relitigating those same issues in this forum."

25. However, Cause No. 06-0146 was not a Hague Convention case, but rather a suit for temporary enforcement of a Chilean visitation order, limited in

the relief sought to the month of February 2006. Tim in that cause did not invoke the Hague Convention, but rather the Uniform Child Custody Jurisdiction and Enforcement Act (Texas Family Code, Chapter 152). The issue in that case was whether, and in what manner, the Texas court would enforce a Chilean court order granting access during a particular one-month period of time.

26. Thus the principal issue in that case was not whether, pursuant to an international treaty and implementing legislation, the court should return a child because of his wrongful removal from Chile. The federal legislation and the treaty have their own particular structure and strictures, as is shown by the detailed requirements set out above in the section of this brief on ELEMENTS OF PLAINTIFF'S CASE.

27. A Hague Convention case does not involve, strictly speaking, the enforcement of a foreign order. In fact, there does not have to be a foreign order for the Hague Convention to apply. In one case, the United States Court of Appeals for the Ninth Circuit admitted a Hague Convention proceeding in the State of Washington for the return of a child to Germany, even though the parent applicant had already litigated custody in California and lost in the trial court. *Holder v. Holder*, 305 F.3d 854 (2002).

28. The doctrine of *res judicata*, frequently referred to in current terminology as "claim preclusion", normally requires for its application identical parties and identical issues. Here, the parties are identical but the issues are not.

29. In paragraph 7 of her FIRST AMENDED ORIGINAL ANSWER, Defendant "asserts that any foreign order that Plaintiff may be attempting to

enforce in this action has been superceded by the subsequent orders of the Texas district court in Cause No. 06-0146". As pointed out above, a Hague Convention case is not a suit for enforcement of an order, but rather a sui generis proceeding based on meeting the elements of an international treaty and its federal implementing legislation.

30. In any case, Cause No. 06-0146, being limited in its time and scope, could not supercede a course of litigation over care of the child and access which had occurred in the Chilean courts. On its fact, it does not meet any of the requirements of the UCCJEA for the modification of foreign orders.

31. Finally, Article 17 of the Hague Convention provides as follows:

> The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

32. Since the decision in Cause No. 06-0146 does not express the reasons for the court's action, it would be pure speculation to try to fathom reasons in order to take them into account in this cause.

* * *

AMICUS CURIAE BRIEF

No. 08-645

In the Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT, PETITIONER

v.

JACQUELYN VAYE ABBOTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a *ne exeat* order, which prohibits either parent from removing a child from the country without the other parent's consent, confers a "right of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction, thus allowing a parent to seek to have a child who was removed to another country in violation of the *ne exeat* order returned to his or her country of habitual residence.

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In the Supreme Court of the United States

No. 08-645

TIMOTHY MARK CAMERON ABBOTT, PETITIONER

v.

JACQUELYN VAYE ABBOTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. The Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention or the Convention) was adopted in 1980 to address the growing problem of international child abduction by persons involved in child custody disputes. *Hague International Child Abduction Convention; Text and Legal Analysis (Convention Text and Legal Analysis)*, 51 Fed. Reg. 10,498 (1986); see Convention on International Childhood Abduction, *done* Oct. 25, 1980, T.I.A.S. No.

11,670, 1343 U.N.T.S. 49.[1] To facilitate the international cooperation that is necessary to deter and remedy such abductions, the Convention establishes uniform legal standards and procedures to be employed by States parties when a child is abducted from one country to another. See 42 U.S.C. 11601(a); see also Convention, introductory decls., Art. 1. In particular, the Convention provides that children abducted in violation of a parent's custody rights should be promptly returned to their country of habitual residence. See *id.* Art. 1. The return remedy is designed to "protect children internationally from the harmful effects of their wrongful removal or retention" by quickly restoring them to their established family and social networks. See *id.* introductory decls.; 51 Fed. Reg. at 10,504. It also prevents the abducting parent from gaining any legal advantage from removing the child to a different jurisdiction, and ensures that decisions relating to the child's custody are made by the courts of his or her country of habitual residence. See *id.* at 10,498.

The Convention applies to any child under the age of 16 who is "wrongfully removed" from one contracting State to another. Convention Arts. 1(a), 4. Removal is "wrongful[]" if it is (1) "in breach of rights of custody attributed to a person, * * * either jointly or alone, under the law of the State in which the child was habitually resident," *id.* Art. 3(a); and (2) "at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised

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[1] The English-language text of the Convention is reprinted at 51 Fed. Reg. at 10,498-10,502, together with an analysis prepared by the Department of State and submitted to the Senate Committee on Foreign Relations in connection with the Senate's consideration of the Convention. See *id.* at 10,494, 10,503-10,516.

but for the removal or retention," *id.* Art. 3(b). "Rights of custody," for purposes of the Convention, "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." *Id.* Art. 5(a).

Upon finding that a child's removal was wrongful —that is, that it violated the custody rights of the left-behind parent—authorities in the State where the child has been brought must, subject to certain defenses, "order the return of the child forthwith."[2] Convention Art. 12. That remedy reflects the Convention's premises that custody determinations should be made by the courts in the child's country of habitual residence, and that the abducting parent should gain no benefit from attempting unilaterally to change the forum. Elisa Perez-Vera, *Report of the Special Comm'n: Hague Conference on Private International Law, in 3 Actes et Documents de la Quatorzième Session (Child Abduction)* 172, paras. 16, 19, at 177 (Permanent Bureau trans. 1982) (*Explanatory Report*).[3] Accordingly, a court considering a petition for the return of the child is not to make any determination of the parties' custody rights, and any decision made concerning return under the Convention "shall not be

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[2] In contrast, the Convention does not provide the return remedy for violations of "rights of access," which "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention Art. 5(b). Rather, an individual whose access rights have been violated may petition to "secur[e] the effective exercise of" her rights. *Id.* Art. 21.

[3] The *Explanatory Report* is recognized "as the official history and commentary on the Convention." *Convention Text and Legal Analysis*, 51 Fed. Reg. at 10,503. Courts have recognized the *Explanatory Report* as "an authoritative source for interpreting the Convention's provisions." See, *e.g.*, *Croll* v. *Croll*, 229 F.3d 133, 137 n.3 (2d Cir. 2000), cert. denied, 534 U.S. 949 (2001).

taken to be a determination on the merits of any custody issue." Convention Arts. 16-17, 19.

The United States participated in the negotiations concerning the Convention's terms, and the Convention entered into force for the United States in 1988. *Convention on International Child Abduction*, *supra*. In order to implement the Convention, Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq.*, which establishes procedures for requesting return of a child abducted to the United States.[4] In so doing, Congress found that "concerted cooperation pursuant to an international agreement" and "uniform international interpretation of the Convention" were necessary to combat international child abduction. 42 U.S.C. 11601(a)(3) and (b)(3)(B).

ICARA authorizes "[a]ny person" seeking return of a child pursuant to the Convention to file a petition for relief in state or federal court. 42 U.S.C. 11603(b). The court "shall decide the case in accordance with the Convention." 42 U.S.C. 11603(d). A child determined to have been wrongfully removed is to be "promptly returned," unless the party opposing return establishes the applicability of one of the Convention's "narrow exceptions." 42 U.S.C. 11601(a)(4), 11603(e)(2). Those exceptions—which include situations in which the child

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[4] As required by Article 6 of the Convention, ICARA also provides for a "Central Authority for the United States," to be designated by the President. 42 U.S.C. 11606(a). Under the Convention, each Central Authority is charged with "promot[ing] co-operation amongst the competent authorities in their respective States" and performing various duties, including facilitating voluntary returns and providing legal and investigative resources. Convention Art. 7. The Office of Children's Issues in the Bureau of Consular Affairs in the State Department serves as the Central Authority for the United States. See 22 C.F.R. 94.2.

would face a "grave risk" of harm upon his or her return, Convention Art. 13(b), the child is old enough to object, *id.* Art. 13, or return would violate "fundamental principles" of the requested State, *id.* Art. 20—may be raised as affirmative defenses to the return of the child.[5] 42 U.S.C. 11603(e)(2).

2. Petitioner is a British subject who married respondent, a United States citizen, in England in 1992. Pet. App. 1a. In 1995, while living in Hawaii, the couple had a child, A.J.A. *Id.* at 1a, 16a. Eventually, petitioner and his family moved to Chile. *Id.* at 1a. In March 2003, petitioner and respondent separated, and they subsequently litigated various custody and visitation issues in the Chilean family courts. *Id.* at 1a-2a. As relevant here, the courts granted respondent daily care and control of A.J.A. and accorded petitioner "direct and regular" visitation rights, including a full month of summer vacation. *Id.* at 2a, 16a-17a. The courts also entered, at respondent's request, a *ne exeat* order that prohibited either parent from removing A.J.A. from Chile without the other's consent. *Id.* at 17a.[6]

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[5] Domestic custody and relocation law is animated by the same principles as the Convention, and contemplates similar results. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), 9 U.L.A. §§ 201-202 (1999), provides that a court that makes an initial custody determination maintains exclusive and continuing jurisdiction over that determination. The UCCJEA also attempts to deter interstate child abduction by providing that courts generally must recognize and enforce, by any available remedy, existing custody and visitation decrees entered in other jurisdictions, *id.* § 303.

[6] Petitioner also held a *ne exeat* right under a Chilean statute that requires authorization from a parent having visitation rights before the other parent may take a child out of Chile. See Pet. 4 (citing Minor's Law 16,618 art. 49 (Chile)); Pet. App. 61a; see also *Villegas Duran* v. *Arribada Beaumont*, 534 F.3d 142, 147-148 (2d Cir. 2008) (characteriz-

In August 2005, respondent removed A.J.A. from Chile without petitioner's consent. At the time, petitioner was seeking to expand his rights with respect to A.J.A., and several motions were pending before the Chilean family court. Subsequently, petitioner hired a private investigator and located his son in Texas. Pet. App. 2a.

3. Petitioner commenced this action in the District Court for the Western District of Texas in May 2006, seeking to have A.J.A. returned to Chile pursuant to the Convention and ICARA. Pet. App. 2a-3a, 17a. The district court denied the request. *Id.* at 15a. The court acknowledged that respondent's removal of A.J.A. without petitioner's consent "violated and frustrated the Chilean court's order." *Id.* at 19a-20a, 24a. The court concluded, however, that the removal was not "wrongful" within the meaning of the Hague Convention because petitioner's *ne exeat* right did not constitute a right of custody under the Convention. *Id.* at 26a.

The court of appeals affirmed. Pet. App. 1a-14a. The court observed that the courts of appeals are divided on the question whether a *ne exeat* right constitutes a "right[] of custody" for purposes of the Convention. *Id.* at 6a-7a. As the court noted, three courts have concluded that a *ne exeat* right is not a custody right. See *Fawcett* v. *McRoberts*, 326 F.3d 491, 500 (4th Cir.) (holding that a *ne exeat* right was simply a "limitation on the custodial parent's right to expatriate his child" and therefore not a right of custody) (citation omitted), cert. denied, 540 U.S. 1068 (2003); *Gonzalez* v. *Gutierrez*, 311 F.3d 942, 948-949 (9th Cir. 2002) (holding that a *ne exeat*

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ing Minor's Law 16,618 art. 49 as conferring a *ne exeat* right), petition for cert. pending, No. 08-775 (filed Dec. 12, 2008).

right was not custodial because the parent holding it could not "direct with any specificity where the children" would live); *Croll* v. *Croll*, 229 F.3d 133, 138-139 (2d Cir. 2000) ("custody is something other and more than a negative right or veto"), cert. denied, 534 U.S. 949 (2001). The Eleventh Circuit, the court below noted, has "reached the opposite conclusion." Pet. App. 6a-7a (footnote omitted); see *Furnes* v. *Reeves*, 362 F.3d 702, 720 (because of *ne exeat* right, parents "share a divided right to determine [the child's] place of residence"), cert. denied, 543 U.S. 978 (2004). The court of appeals also stated that "foreign courts disagree regarding whether *ne exeat* rights are 'rights of custody' within the meaning of the Hague Convention." Pet. App. 11a.

Adopting the Second Circuit's analysis in *Croll*, the Fifth Circuit held in this case that petitioner was not entitled to have A.J.A. returned to Chile, because the *ne exeat* right was only a "partial power" that gave petitioner "a veto" over A.J.A.'s country of residence, but not a "righ[t] to determine where in Chile his child would live." Pet. App. 7a-8a, 13a. The court also emphasized the Chilean courts' grant of physical custody to respondent, and determined that petitioner possessed only rights of access, not rights of custody. *Id.* at 13a-14a. Under the Convention, the court concluded, petitioner's access rights could not provide a basis for ordering the return of the child to Chile. *Ibid.*

DISCUSSION

The court of appeals incorrectly held that petitioner's *ne exeat* right does not constitute a "right[] of custody" within the meaning of the Hague Convention. Understanding a *ne exeat* right as a "right[] of custody" best gives effect to the Convention's broad definition of cus-

tody rights, which expressly includes the "right to determine the child's place of residence." Convention Art. 5(a). That result also furthers the Convention's purpose of protecting from interference all of the ways in which parents can be accorded control over decisions affecting a child's care and residence.

Because the court of appeals' decision deepens the disagreement among the circuit courts on the proper characterization of the *ne exeat* right, and deviates from the view of a majority of courts in States parties that have considered the issue, the petition for a writ of certiorari should be granted.

A. The Court Of Appeals Erred In Holding That A *Ne Exeat* Right Is Not A Right Of Custody

1. a. Under the Convention, a removal is wrongful if it is a breach of "rights of custody attributed to a person * * * either jointly or alone." Convention Art. 3(a). The Convention defines "rights of custody" expansively, stating that they "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." See *id.* Art. 5(a). The definition is purposefully phrased in inclusive, rather than exhaustive, language: the Convention seeks "to protect *all* the ways in which custody of children can be exercised." *Explanatory Report* para. 71.[7] Consequently, the definition of custody under the Convention is an "autonomous concept," Hague Con-

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[7] Because the *Explanatory Report* is the "official history" of the Convention and "a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it," 51 Fed. Reg. at 10,503, it is proper to look to the *Explanatory Report* to illuminate the meaning of the Convention's text. See *Air France* v. *Saks*, 470 U.S. 392, 400 (1985).

ference on Private International Law, *Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 29 I.L.M. 219, ¶ 9, at 222 (1990),[8] and may be broader than any participating country's domestic conception of custody. See *C.* v. *C.*, [1989] 1 W.L.R. 654, 658 (Eng. C.A.) (Butler-Sloss, L.J.); *In re D*, [2007] 1 A.C. 619, 635 (H.L.) (U.K.); see also *Furnes* v. *Reeves*, 362 F.3d 702, 711 (11th Cir.), cert. denied, 543 U.S. 978 (2004).

The *ne exeat* right is a "right[] of custody" under Article 5(a) because it is a joint "right to determine the child's place of residence." See *Furnes*, 362 F.3d at 714-716, 719-722; see also *Croll*, 229 F.3d at 144-154 (Sotomayor, J., dissenting). A parent who holds a *ne exeat* right has the ability to decide whether or not the child may be taken outside of the country of habitual residence, and thus the right to share in the decision as to where the child will reside. See *Furnes*, 362 F.3d at 715. Inherent in that right, moreover, is the ability to take part in more specific decisions about the child's residence. In agreeing to relocation outside the country, a parent with a *ne exeat* right may impose conditions on the relocation, thereby having a say in which new country, or community within that country, a child will reside. See *id.* at 719-721; *C.*, 1 W.L.R. at 663 (Neil, L.J.)

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[8] The multilateral Special Commission to Review the Operation of the Hague Convention (Special Commission) is organized by the Permanent Bureau of the Hague Conference on Private International Law. It serves as a forum for the States parties to meet and review the operation of the Convention. The Special Commission's reports are issued after each meeting, and express the consensus views of the participating States parties. The United States has participated in each Special Commission meeting since the Commission's inception.

("[T]his right to give or withhold consent[,] * * * coupled with the implicit right to impose conditions, is a right to determine the child's place of residence.").

In according a parent effective control over the country in which the child will grow up, a *ne exeat* order also gives the parent a substantial say in the child's care and development. The choice of country will determine everything from the child's primary cultural identity—the languages she speaks, the games she plays—to the character of the schools that she attends and the opportunities that will be open to her as an adult. The *ne exeat* right thus confers on the parent significant, if indirect, "decision-making authority over the child's care." *Furnes*, 362 F.3d at 716 (By holding a *ne exeat* right, "Plaintiff Furnes effectively can decide that [the child] will *be Norwegian.*").

Protection of the *ne exeat* right as a right of custody also effectuates the parties' intent in crafting the Convention's wrongful removal provisions. A *ne exeat* right acts as a limitation on the custody rights of the parent with physical custody, permitting that parent to exercise her custody rights only in the home country, and requiring her to obtain the approval of the *ne exeat* holder before relocating to another. See *Croll*, 229 F.3d at 148 (Sotomayor, J., dissenting); *Sonderup* v. *Tondelli*, 2000(1) Constitutional Court of South Africa 1171, at para. 25 (effect of the *ne exeat* order was that "the mother was entitled to exercise her rights of custody * * * only in British Columbia"). A violation of a *ne exeat* order is thus a wrongful attempt to expand one's custody rights at the expense of the other parent's joint decision-making authority—just the kind of harm that the Convention aims to prevent. See *Explanatory Report* paras. 13, 15, 71; *Croll*, 229 F.3d at 146-147 (Soto-

mayor, J., dissenting); see *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999) (*El Al*) ("[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.") (brackets in original) (quoting *Air France* v. *Saks*, 470 U.S. 392, 399 (1985)).

Consistent with the foregoing principles, the Department of State, whose Office of Children's Issues serves as the Central Authority for the United States under the Convention, considers the Convention to include *ne exeat* rights among the protected "rights of custody."[9]

b. The court of appeals' holding that a *ne exeat* right is not a custody right was based on several incorrect conclusions regarding the Convention's text and scope. First, the court adopted *Croll*'s reasoning that the Convention protects only those persons who possess the full "bundle of rights relating to custody, such that possessing only one of the rights [does] not amount to having 'rights of custody.'" Pet. App. 7a-8a (quoting *Croll*, 229 F.3d at 138-139). But that conclusion fails to acknowledge the ways in which the Convention contemplates that the "bundle" of custody rights may be divided. See *Furnes*, 362 F.3d at 714. The Convention provides that custody rights may be held jointly, Convention Art. 3(a), so that removal of a child by one holder of joint custody is wrongful even though the other joint holder by definition does not possess unilateral custody rights. *Explanatory Report* para. 71. In addition, the *Explanatory Report* indicates that a parent possessing only some, but not all, custody rights may seek a child's return. *Id.*

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[9] Although the State Department has not previously memorialized its interpretation, this position represents the Department's "considered judgment on the matter." *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997); see note 12, *infra*.

para. 78 (parent may seek return even if the child possesses the right to determine his own residence, because "the right to decide a child's place of residence is only one possible element of the right to custody"). The Convention thus does not distinguish between parents who possess full, unilateral custody over a child, and those who possess only more particular custody rights. Rather, the Convention is intended to encompass *all* of the ways in which the domestic law of the various parties may create—and divide—rights of custody. *Id.* para. 67; see *Furnes*, 362 F.3d at 716 & n.12.

Second, the court of appeals characterized the *ne exeat* right as a mere "veto right," Pet. App. 13a, rather than an affirmative right to "determine" residence. See *Croll*, 229 F.3d at 139. But given the Convention's recognition of joint custodial arrangements, this reasoning is but a mistaken attempt to pry apart two sides of one coin. To be sure, a *ne exeat* right can be framed as a veto right that prevents the other parent from removing a child from the country. But a *ne exeat* right can be understood no less accurately as an affirmative right to participate with the other parent in the determination of the country in which the child should reside. The "veto" implies and effectuates a joint right of control, and as just noted, the Convention contemplates that joint rights may count as custodial.

Third, the court viewed the *ne exeat* right as conferring insufficient control over "residence" to qualify as a right of custody because it did not encompass the right to determine where the child would live *within* the country. Pet. App. 8a, 12a-13a. But the Convention provides no basis for construing the "right to determine the child's place of residence" so narrowly. The phrase "place of residence" can connote both a specific location

within a country and the very country itself. The Convention's essential focus is on the country as a place of residence, given that its entire purpose is to prevent the wrongful removal of children across international borders. Convention Art. 1(a); see *Explanatory Report* paras. 15, 56. And, as noted above, the choice of country in which a child will reside is likely to have a significant impact on the child's life and care. Therefore, "the only logical construction of the term 'place of residence' in the Convention" is that it "necessarily encompass[es] decisions regarding whether [a child] may live outside of" the home country. *Furnes*, 362 F.3d at 715; see *C.*, 1 W.L.R. at 658.

Finally, the court relied on what it regarded as the Convention's sharp distinction between "rights of custody" and "rights of access." See Pet. App. 14a; *id.* at 12a. This distinction indeed exists, but the court erred in assimilating the *ne exeat* right to a right of access. See *Croll*, 229 F.3d at 145 (Sotomayor, J., dissenting). Unlike a *ne exeat* holder, a parent with access rights has only visitation rights, 42 U.S.C. 11602(7); the parent does not have the right to participate in decisions concerning the child's country of residence. This difference is fundamental under the terms of the Convention. It explains why the *ne exeat* holder, but not the parent with simple access rights, can invoke the Convention's remedy of return.[10]

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[10] The *Croll* court also denied return of the child in part because it assumed that if return were ordered, the child would be returned to a parent "whose sole right—to visit or veto—imposes no duty to give care." 229 F.3d at 140. The return contemplated by the Convention, however, is a return to the child's country of habitual residence—not a return to a particular person. An abducting parent who has had physical custody is free to return with the child to the country of habitual

2. The court of appeals' decision also deviates from the postratification understanding of a majority of States parties to the Convention. In interpreting the language of a treaty, "the opinions of our sister signatories [are] entitled to considerable weight." *Saks*, 470 U.S. at 404 (citation omitted); *El Al*, 525 U.S. at 175-176 & n.16 (relying on foreign intermediate and highest court decisions). That is particularly so here, given the Convention's and Congress's emphasis on the importance of uniformity in interpreting the Convention.

Courts in the United Kingdom, Australia, South Africa, New Zealand, and Israel have adopted the view that a *ne exeat* right creates a right of custody. See, *e.g.*, *C.*, 1 W.L.R. at 658; *A.J.* v. *F.J.*, [2005] ScotCS CSIH_36; *Secretary for Justice* v. *Abrahams, ex parte Brown*, [2001] FP 069/134/00 (Fam. Ct.) (Taupo, N.Z.) (parent with guardianship rights under South African law had "right to determine children's place of residence" because guardianship rights included *ne exeat* right); *In the Marriage of Resina*, [1991] FamCA 33, para. 26 (Austl. Fam.); *Sonderup* v. *Tondelli*, *supra*, para. 25 (holding that *ne exeat* clause in interim custody order constituted custody right); C.A. 5271/92 *Foxman* v. *Foxman* [1992] (H.C.) (Isr.).

One court in another signatory nation has held that a *ne exeat* right does not constitute a right of custody.[11]

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residence, or to petition the courts of that country for an adjustment of custody rights. See *Furnes*, 362 F.3d at 717.

[11] In addition, the Supreme Court of Canada has twice stated, in dicta, that a *ne exeat* right may not be a right of custody. See *Thomson* v. *Thomson*, [1994] 119 D.L.R. (4th) 253; *D.S.* v. *V.W.*, [1996] 134 D.L.R. (4th) 481. Neither case had before it a controversy involving a parent who violated a *ne exeat* order after a final custody order had issued. See *In re D*, *supra* (characterizing statements of Supreme Court of

In *Ministère Public* c. *Mme. S., D.S.*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Perigueux, Mar. 17, 1992, D.S. Jur. 1992 (Fr.), the court refused to order return of children to the United Kingdom because it viewed the *ne exeat* order as a mere limit on the mother's exercise of her custody rights, and also as an impermissible restriction on the mother's right to expatriate under the European Convention for the Protection of Human Rights and Fundamental Freedoms. That decision, however, is inconsistent with an earlier French decision, see *Ministère Public c. M.B.*, Cour d'appel [CA] [regional courts of appeal] Aix-en-Provence, Mar. 23, 1989, which held that a *ne exeat* right is a custody right that triggers the Convention's return remedy.

Mme. S., moreover, has been recognized by the Special Commission of States parties as out of step with the prevailing view of the Convention. The Special Commission noted that the court's conclusion that a *ne exeat* right "constituted only a 'modality' attached to the right of custody and not a situation of joint custody, gathered no support." *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduc-*

Canada as dicta). In *Thomson*, the court ordered the return of a child based on violation of a *ne exeat* clause in an interim custody order, but suggested that a final *ne exeat* order would "raise[] quite different issues" because such an order is "usually intended" to protect access rights. In *D.S.*, the petitioning parent had no *ne exeat* right, but asserted that a similar restriction was implicit in a court order. The court held that a return remedy was not available, referring to *Thomson*'s statement that violations of removal restrictions concern only access rights, not custody rights.

tion, Question 5 (1993).[12] Moreover, the Commission noted, *Mme. S.*'s holding "had been rejected by the *Cour d'appel d'Aix-en-Provence*, as well as courts in Austria, Australia, the United Kingdom and the United States of America." *Ibid.*

Thus, the prevailing view among courts in States parties to have considered the issue is that a *ne exeat* right constitutes a right of custody. See *In re D*, *supra* (surveying case law, and noting that opinion in common-law countries was virtually "united"); Hague Conference on Private International Law, *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice* 43 (2008) <http://www.hcch.net/upload/guidecontact_e.pdf> ("preponderance of the case law" holds that *ne exeat* is a custody right, and the opposing view "does not command widespread support").

B. There Is Disagreement Among The Circuits As To Whether A *Ne Exeat* Right Is A Custody Right

This Court's review is warranted to resolve the disagreement among the courts of appeals regarding whether a *ne exeat* right is a custody right under the Convention. The court below followed decisions of the Second, Fourth, and Ninth Circuits in holding that *ne exeat* orders do not confer custody rights. Pet. App. 6a-7a; see *Fawcett* v. *McRoberts*, 326 F.3d 491, 500 (4th Cir.), cert. denied, 540 U.S. 1068 (2003); *Gonzalez* v. *Gutierrez*, 311 F.3d 942, 948 (9th Cir. 2002); *Croll*, 229 F.3d

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[12] The Department of State has informed this Office that its representatives at the Special Commission meeting were in agreement that a *ne exeat* right should be considered a custody right.

at 138-139. The Eleventh Circuit has reached the opposite conclusion.[13] See *Furnes*, 362 F.3d at 719.

To be sure, as respondent correctly points out (Br. in Opp. 10-11), the Eleventh Circuit's holding that the petitioning father possessed custody rights under the Convention was based not only on his *ne exeat* right, but also on his rights of "joint parental responsibility" under Norwegian law. *Furnes*, 362 F.3d at 712-713. Nevertheless, the *Furnes* court unambiguously concluded, expressly "diverg[ing] from" other courts of appeals, *id.* at 719, that the "*ne exeat* right under Norwegian law is a right of custody under the Convention," *id.* at 716. The court therefore found it unnecessary to determine definitively whether the father's "joint parental responsibility" constituted a custody right. See *id.* at 714, 719. As a result, the court below correctly described *Furnes* as creating a "[c]ircuit [s]plit," Pet. App. 6a, by holding "that a *ne exeat* right alone is sufficient to constitute a custody right," *id.* at 10a (footnote omitted).

C. The *Ne Exeat* Issue Is An Important Question That Merits This Court's Review, And This Case Is A Suitable Vehicle

1. The question presented is important because it implicates the United States' ability to fulfill its obligations as a party to the Convention. Uniformity in application is key to the Convention's goals of deterring international parental abduction and achieving the prompt

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[13] The state courts to consider the issue have agreed with the Eleventh Circuit that a *ne exeat* right is a right of custody under the Convention. See *Janakakis-Kostion* v. *Janakakis*, 6 S.W.3d 843, 848-849 (Ky. Ct. App. 1999), cert. denied, 531 U.S. 811 (2000); *D'Assiquies* v. *Escalante*, No. BD 051876 (Cal. Super. Ct. Dec. 9, 1991) <http://www.hcch.net/incadat/fullcase/0198.htm>.

return of abducted children. See Convention Art. 1; *Explanatory Report* para. 16. In enacting the Convention's implementing legislation, Congress explicitly recognized "the need for uniform international interpretation of the Convention," 42 U.S.C. 11601(b)(3)(B). The court of appeals' decision and the other decisions following *Croll* have grafted an unduly narrow concept of custody rights onto the Convention, thereby rendering the United States an outlier among States parties on the *ne exeat* issue, causing disparities in interpretation that threaten to undermine the efficacy of the Convention, and creating an incentive for abducting parents who violate *ne exeat* orders to bring their children to the United States. As a leader in negotiating the Convention and overseeing its operation, the United States has a strong interest in avoiding those consequences and in promoting comity in the application of the Convention.

The disagreement among domestic courts—which the court of appeals' decision deepens—also results in inconsistent application of the Convention within the United States. The United States is among the States parties that receive the highest yearly number of applications for the return of abducted children. See Hague Conference on Private International Law, *A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* 13 (2007). Especially because the United States is a primary destination for parents who have abducted their children, the United States Central Authority needs the benefit of a settled and uniform interpretation of the Convention, so that it can perform its functions. See Convention Art. 7; 42 U.S.C. 11606; see also Office of Children's Issues, U.S. Dep't of State, *Incoming Cases: Frequently Asked*

Questions (visited May 27, 2009) <http://travel.state.gov/family/abduction/incoming/incoming_4183.html> (Central Authority offers assistance and various resources to individuals seeking the return of children abducted to the United States).

In addition, the disagreement among the circuits provides abducting parents with the ability to forum shop among United States jurisdictions in order to obtain the most favorable rule. Here, for instance, had respondent brought her son to Florida instead of Texas, he would have been subject to return pursuant to *Furnes*. This disuniformity within the United States undermines the Convention's purpose of preventing abducting parents from obtaining any benefit by choosing a favorable forum to which to take the child. See *Explanatory Report* para. 71.

2. This case presents a suitable vehicle for resolving the question whether a *ne exeat* right is a custody right. Although respondent argues that the *ne exeat* right under Chilean law is not absolute because a Chilean court may override an unreasonable exercise of the right, both courts below construed the Chilean statute and the court's *ne exeat* order as conferring on petitioner the "authority" to prevent removal of his child from the country. Pet. App. 13a; *id.* at 19a-20a, 22a-23a; *Villegas Duran* v. *Arribada Beaumont*, 534 F.3d 142, 147-148 (2d Cir. 2008) (characterizing *ne exeat* right conferred by Chilean statutory law as "the right to determine whether the child will leave the country"), petition for cert. pending, No. 08-775 (filed Dec. 12, 2008). And even if a court does have the power to override one parent's refusal to consent to the child's removal, the *ne exeat* right remains a right of custody. In these circumstances, the *ne exeat* right at the least forces the parent who wishes

to relocate to petition the court for permission, rather than to do so unilaterally. The *ne exeat* right thus continues to give the holder a meaningful ability to participate in the decision whether any relocation should occur. That the *ne exeat* right may not be permanent and unconditional—either because a court can override its exercise or because a court can modify the order granting it in the first place—is not determinative for purposes of the Convention. A right of custody, whether a *ne exeat* right or any other kind, need not be unlimited or unalterable to qualify for the protection that the Convention offers.

Respondent also points out (Br. in Opp. 22-25) that the district court "never reached the question of whether Petitioner was actively 'exercising' any 'rights of custody' he may have had at the time of removal." That is true, but not surprising. The court never reached that question because it is most logically asked *after* a court determines that the petitioning parent has custody rights to exercise. In the event that this Court determines that petitioner's *ne exeat* right is a custody right, the question whether petitioner exercised that right could be addressed on remand. In any event, the Convention permits return when the custody rights "would have been so exercised but for the removal," Convention Art. 3(b), and the evidence here strongly suggests that petitioner would have exercised his *ne exeat* right but for the wrongful removal. See *Furnes*, 362 F.3d at 724. It was respondent's failure to comply with the *ne exeat* clause that actually prevented petitioner from exercising his right, either by consenting to the relocation (with or without conditions) or by withholding consent. *Id.* at 722-723.

Finally, respondent asserts (Br. in Opp. 22), in one sentence, that the possibility of a res judicata defense makes this case an unsuitable vehicle. The court below did not address that argument. If a res judicata issue exists and was properly preserved, it would remain open on remand from this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
MOTION FILED

DEC 17 2008

William K. Suter
Clerk

(2)

No. 08-645

In The
Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,
Petitioner,

v.

JACQUELYN VAYE ABBOTT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF THE PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW AS *AMICUS CURIAE* SUPPORTING PETITIONER

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MOTION OF THE PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Permanent Bureau of the Hague Conference on Private International Law[1] hereby moves for leave to file the accompanying brief as *amicus curiae* in support of the Petitioner.

The Permanent Bureau is responsible for monitoring and reviewing the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*,[2] and for promoting its effective implementation in States Parties. This work is carried out at the request and on behalf of Member States of the Hague Conference and States Parties to the Convention.

The Permanent Bureau therefore has an interest in the correct interpretation of the Convention and in securing the prompt return of children unlawfully removed from their country of habitual residence.

The Permanent Bureau submits that the decision of the court of appeals is in error, that it poses an obstacle to the proper operation of the Convention in the United States in light of the wide use of non-

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[1] Hereafter referred to as "the Permanent Bureau".

[2] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89. Hereafter referred to as "the Convention".

removal ("*ne exeat*") provisions to regulate post-separation, divorce and other custodial arrangements, and that, because it is inconsistent with decisions adopted by courts in many other States Parties, it may have adverse effects on the operation of the Convention more generally.

This motion is necessary because Respondent's counsel has failed to give any answer to the timely written request for consent to the filing of this brief.

Respectfully submitted,

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QUESTION PRESENTED

The Permanent Bureau will address the following question:

Whether a *ne exeat* provision may give rise to "rights of custody" within the meaning of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

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Statute of the Hague Conference on Private International Law (15 July 1955), Article 1, T.I.A.S. No. 5710, 2997 U.N.T.S. 123 1

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Guide to Good Practice on Transfrontier Contact Concerning Children, Jordan Publishing, 2008, *also available* at <www.hcch.net>, under "Child Abduction Section" and then "Guides to Good Practice" 14, 15

Report on the Second Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child* (18-21 January 1993)", drawn up by the Permanent Bureau, *available at* <www.hcch.net>, under "Child Abduction Section", then "Special Commission meetings on the practical operation of the Convention" 13

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INTEREST OF THE AMICUS CURIAE[1]

The Hague Conference on Private International Law is a global, intergovernmental organisation, whose mission as set forth in the implementing international treaty is "to work for the progressive unification of the rules of private international law".[2] The principal method used to achieve this end consists of the negotiation and drafting of multilateral treaties or Conventions in the different fields of private international law. One of these Conventions is the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*[3] to which

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[1] Pursuant to Supreme Court Rule 37.2, counsel for the *amicus* certifies that counsel of record for all parties received timely notice of its intention to file an *amicus* brief at least 10 days prior to the due date for the *amicus curiae* brief. Petitioner consented to this filing. Pursuant to Supreme Court Rule 37.6, counsel for the *amicus* certifies that this brief was not authored in whole or in part by counsel for any other party, and that no person or entity other than the *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief.

[2] Statute of the Hague Conference on Private International Law (15 July 1955), Article 1, T.I.A.S. No. 5710, 220 U.N.T.S. 123. The Statute was adopted during the Seventh Session of the Hague Conference On Private International Law on 31 October 1951 and entered into force on 15 July 1955. Amendments were adopted during the Twentieth Session on 30 June 2005 (Final Act, C), approved by Members on 30 September 2006 and entered into force on 1 January 2007. See for this and other texts and information the website of the Hague Conference <www.hcch.net>.

[3] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89. Hereafter referred to as "the Convention".

there are currently 81 States Parties,[4] including the United States of America.

The Hague Conference currently consists of 69 members, 68 Member States (including the United States of America) and one Regional Economic Integration Organisation.[5] It became a permanent intergovernmental organisation following the entry into force of the Statute of the Hague Conference on 15 July 1955. The Permanent Bureau of the Hague Conference on Private International Law[6] is the secretariat of the Hague Conference and has the role of monitoring and reviewing the operation of the Convention.

STATEMENT

The Permanent Bureau respectfully submits this *amicus curiae* brief in support of the Petitioner. It is argued that the court of appeals erred in its interpretation and application of the Convention, and in particular should have found that a *ne exeat* provision did, in the circumstances, give rise to "rights of custody" within the meaning of the Convention.

A *ne exeat* provision in this context forbids the removal of a child from the jurisdiction by the custodial parent (or primary caregiver) without the consent of the other parent or the court. When a

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[4] This includes 22 States that are not Members of the Hague Conference.

[5] The European Community.

[6] Hereafter referred to as "the Permanent Bureau".

removal occurs in breach of such a provision, the left-behind parent often looks to the Convention and in particular the return remedy under Article 12. In order for the Convention to apply the removal must be in breach of custody rights attributed by the law of the State in which the child was habitually resident immediately before his or her removal. It is for the court in the requested State to determine whether the rights attributed under the law of the State of the child's habitual residence do or do not constitute "rights of custody" within their autonomous Convention meaning.

Article 5 provides that for the purposes of the Convention "rights of custody" include rights relating to the care of the person of the child and, in particular, the right to determine the child's residence. Article 3 shows that custody rights may be attributed to a person, an institution or any other body and states that these rights may arise in particular by operation of law or by reason of a judicial or administrative decision or by reason of an agreement having legal effect.

In the case before the Court, the question is whether the *ne exeat* provision in Chilean statute law and in the Chilean court order comes within the meaning of "rights of custody" under the Convention.

This brief has two purposes. The first is to explain why it is important and in the interests of children and their families that courts should, when interpreting the Convention, place a high value on consistency. Both between Contracting States and within Contracting States significant divergences in the interpretation of Convention concepts tend to

undermine the mutual confidence between States Parties upon which the successful operation of the Convention depends. It may also dilute the clear message to parents which has been a characteristic feature of the Convention and which has dissuaded many parents from engaging in the unilateral relocation of children.

The second purpose is to confirm and support the Petitioner's statements concerning the context in which the relevant language of the Convention is used[7] and to indicate the broad consensus that has developed among Contracting States in relation to the matter in issue. This broad consensus – that *ne exeat* provisions are constitutive of "rights of custody" under the Convention – is evidenced both by case law and by formal discussions that have taken place among representatives of States Parties.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE IMPORTANCE OF CONSISTENCY FOR THE OPERATION OF THE CONVENTION

The case for consistency in interpretation of the Convention falls into two parts. First there are concerns that lack of consistency is damaging to the specific purposes served by the Convention. Second, there are more general arguments which arise from the nature of this and other similar conventions and the international law context in which they operate.

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[7] Part III A, at p. 25 of the Petition.

A principal object of the Convention is to protect children from the harmful effects of their wrongful removal or retention across international boundaries. The Convention fulfils this objective not only by providing a remedy (the return order) for cases where wrongful removal or retention has occurred, but also by creating a firm legal structure which makes it less likely that such cases will occur. One of the great strengths of the Convention is that it gives a clear message to a parent who is considering removing a child to another jurisdiction about what is the right way to proceed, and what is the wrong way. A divergence in the interpretation of the Convention, particularly in the interpretation of a fundamental concept such as "rights of custody" results in a blurring of this message.

This blurring of the message can lead to two undesirable consequences. It may increase the attractiveness of certain jurisdictions as places to which a child is abducted. If a parent is aware that if he or she brings the child to a particular location and the application of the Convention there will not result in the return of the child, the parent is more likely to choose that location, rather than a location where the interpretation of the Convention will result in the return of the child.

One of the major problems that the drafters of the Convention wished to prevent is that of a parent actively forum shopping by removing a child from one jurisdiction to another. In order to ensure that this aim is still achieved, it is necessary, as much as is reasonably possible, to ensure that the response given by the courts in all States Parties to an individual abduction will be the same.

Another undesirable consequence is the effect that uncertainty can have on the swift resolution of applications under the Convention. A key component to the satisfactory operation of the Convention is the use of expeditious procedures and the speedy resolution of cases.[8] When there is a division in approach to the interpretation of the Convention, such division provides technical legal arguments to the parties involved that they can pursue to a higher appeal level. This prolongs the proceedings and slows down the resolution of the case.

With regard to the more general arguments for consistency, it should be recalled that there is no supranational body to provide a final and binding interpretation of the autonomous terms of the Convention. Instead responsibility rests with the individual courts and judges in each Contracting State to help bring about a consistent approach to the interpretation of key concepts. It is therefore important that national courts take into account the approach that other States' courts are taking with regard to the interpretation of Convention concepts and there is much evidence that this is increasingly the case.[9] The same is true of many other modern

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[8] See *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures*, Jordan Publishing, 2003, p. 11.

[9] See *e.g. Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) (INCADAT Cite: HC/E/USf 301) where the court referred to cases in Australia, Canada, Sweden and the United Kingdom, as well as the United States of America. In other jurisdictions, the Australian High Court referred to cases from Canada, Ireland,

international conventions under which the courts in the different Contracting States exercise what amounts to a joint responsibility.

Where serious divergences in interpretation do occur as between Contracting States, this can affect the mutuality which is at the heart of treaty relations generally, and of the Convention, which is an international instrument for judicial and administrative co-operation based upon reciprocity, in particular. Under the Convention, if it becomes clear that one Contracting State is not prepared to make the return order available in circumstances where other Contracting States will do so, reciprocity is breached and the mutual trust and confidence on which successful Convention relations depend is affected.

Finally, it should be recalled that States Parties to the Convention do not have a single legislative means of curing problems of divergent interpretation. Any amendment of the Convention will require international negotiations among all the Contracting States involving a long, complex and expensive procedure, followed by an effort to ensure that all

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New Zealand, the United Kingdom and the United States of America in *DP v. Commonwealth Central Authority; JLM v. Director-General NSW Department of Community Services* [2001] HCA 39 (INCADAT Cite: HC/E/AU 347), while the Supreme Court of South Africa referred to cases from Australia, Canada, Germany, United Kingdom and United States of America in *Sonderup v. Tondelli* 2001 (1) SA 1171 (INCADAT Cite: HC/E/ZA 309). Note also that the freely accessible electronic International Abduction Database (INCADAT) was established to facilitate judges in their consideration of the case law of other Contracting States. (The database can be found at <www.incadat.com>.

Contracting States accept the changes by ratifying the international instrument amending the Convention.

It is respectfully submitted that this Court will, if the application for certiorari is granted in this case, have an important opportunity to confirm the value and importance among the community of 81 States Parties to the Convention of seeking to achieve convergence in its interpretation.

II. SUBSEQUENT PRACTICE AND AGREEMENT ON THE INTERPRETATION OF THE CONVENTION

The question at issue in this case is one of the interpretation of an international treaty. In this respect the Permanent Bureau expresses support for the Petitioner's statement concerning the interpretation and in particular the context in which the words of the Convention are used.[10]

The Permanent Bureau would also emphasize that a broad positive consensus has developed among Contracting State on the question of whether a *ne exeat* provision may give rise to a "right of custody" under the Convention. This consensus is evidenced by the international case law, as well as in formal discussions among, and recommendations made by, representatives of the States Parties in the meetings of Special Commissions convened to review the

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[10] Part III A, at p. 25 of the Petition.

practical operation of the Convention and to which all States Parties are invited.[11]

States Parties have made it clear that they would wish the Convention to be interpreted uniformly and having regard to its autonomous nature, and not in a manner limited to the interpretation applied to phrases in purely domestic cases.[12] Thus the expression "rights of custody", for example, does not coincide with any particular concept of custody in a domestic law, but draws its meaning from the definitions, structure and purposes of the Convention. While national concepts and national law rules will undoubtedly influence judges' understanding of the issues at hand, they cannot be seen as decisive in determining the meaning of terms such as "rights of custody" or "rights of access" under the Convention.

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[11] Subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation may, according to customary international law, be taken into account in interpreting the treaty, see Art. 31(3) *a)* of the Vienna Convention on the Law of Treaties which, according to *Libya v. Chad* ICJ Reports (1994), p.4, at para. 4.1, reflects customary international law.

[12] See, for example, Conclusions and Recommendations of the Fourth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22–28 March 2001), drawn up by the Permanent Bureau (hereinafter, "Conclusions and Recommendations of the Fourth Meeting of the Special Commission"), see para. 4.1. Available on the Hague Conference website < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings" and "Preliminary Documents".

III. EXAMINATION OF CASE LAW

The case law shows that courts in a great majority of the Contracting States that have addressed the issue have accepted that a *ne exeat* provision may give rise to a right of custody for Convention purposes. The brief submitted by the Petitioner discusses many of these cases in detail and it is not proposed to repeat that analysis here. Instead, attention will be drawn to a few additional cases, not mentioned there, that are also worth noting.

While reference was made in the Petitioner's brief to the case in the United Kingdom of *C v. C (Abduction: Rights of Custody)*,[13] it should be emphasized that this is not an isolated case, but has been followed by a robust line of cases,[14] most recently the House of Lords decision of *Re D*.[15] While this case centred on the interpretation of Article 15 of the Convention, it also included a detailed discussion of the interpretation of *ne exeat* provisions, or the right to veto a removal from the jurisdiction. Baroness Hale of Richmond, whose view was accepted by the majority of the court, emphasized the importance of consistent practice. Although she acknowledged the force of the arguments against including a person holding a right

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[13] [1989] 1 WLR 654 (INCADAT Cite: HC/E/UKe 34).

[14] Also including in England *C v. C (Minors)(Child Abduction)* [1992] 1 FLR 163 (INCADAT Cite: HC/E/UKe) and in Scotland *McKiver v. McKiver* 1995 SLT 790 (INCADAT Cite: HC/E/UKs 189).

[15] [2007] 1 A.C. 619 (INCADAT Cite: HC/E/UKe 880), mentioned at footnote 2 of the Petitioner's brief.

of veto in the category of persons with rights of custody, she found that it would, at the very least, be an odd result if a Convention designed to secure the summary return of children wrongfully removed from their home countries were not to result in the return of children whose removal had clearly been in breach of the laws, court orders or enforceable agreements in the home country. She was also very careful to indicate that there still remained a clear separation between "rights of custody" and "rights of access" and that the parent had to have more than a right to go to court and ask for an order to prevent, for example, relocation.

Other jurisdictions also have lines of authority accepting the principle that if there is a *ne exeat* provision, and this provision is breached by the abducting parent, this is a wrongful removal within the terms of the Convention. These include Australia,[16] New Zealand, [17] Ireland,[18] Canada[19] and Switzerland.[20]

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[16] Such as, for example, *State Central Authority and Pankhurst* [2007] FamCA 1345; *Secretary, Attorney-General's Department v. T.S.* [2000] Fam.C.A. 1692 (INCADAT Cite: HC/E/AU 823); *Brooke & Director General Department of Community Services* [2002] FamCA 258.

[17] *Gumbrell v. Jones* [2001] N.Z.F.L.R. 593 (INCADAT Cite: HC/E/NZ 446).

[18] *H.I. v. M.G. (Child Abduction: Wrongful Removal)* [2000] 1 I.R. 110 (INCADAT Cite: HC/E/IE 284); *R.C. v. I.S.* [2003] 4 I.R. 431.

[19] *Hewstan v. Hewstan* [2001] BCJ No 590 (BCSC)(QL) (INCADAT Cite: HC/E/CA 753).

[20] TR 132/1999, *Tribunal civil de l'Arrondissement de la Sarine*, 17 May 1999 (INCADAT Cite: HC/E/CH 442).

IV. EXAMINATION OF SPECIAL COMMISSION PROCEEDINGS

The States Parties to the Convention meet together periodically in a Special Commission organised by the Permanent Bureau at the request of the Members of the Hague Conference, to review, and make recommendations on, the practical operation of the Convention.[21] All States Parties to the Convention, Members or non-Members of the Hague Conference are invited to participate in such meetings. So far five of these meetings have taken place, in 1989, 1993, 1997, 2001, and 2006. A variety of issues relating to the practice under the Convention are discussed at these meetings by State representatives and those involved in the abduction procedures, such as Central Authority officials and judges who hear these cases. One recurring issue is the interpretation of key Convention concepts, including the concept of "rights of custody".

In addition to the First Meeting of the Special Commission in 1989, the report of which is cited in the Petitioner's brief, the issue has also arisen in several further meetings of the Special Commission. The Report of the Second Meeting of the Special Commission in 1993 states:

> Conversely the view expressed by the Tribunal de Grande Instance de Périgueux in the case

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[21] The reports of these Special Commission meetings are available on the website of the Hague Conference on Private International Law <www.hcch.net>, under "Child Abduction Section", then "Special Commission meetings on the practical operation of the Convention".

> cited in the Checklist, to the effect that an order of the court granting custody which prohibited the custodian from removing the child from the court's jurisdiction without consent of the other parent constituted only a "modality" attached to the right of custody and not a situation of joint custody, gathered no support. This view had been rejected by the Cour d'appel d'Aix-en-Provence,[22] as well as by courts in Austria, Australia, the United Kingdom and the United States of America.[23]

The issue arose again in 1997 and the Report of the Third Meeting of the Special Commission states:

> There have been a number of cases where the return of the child to a parent with custody rights was denied because that parent had not actually been living with the child for a certain period of time. However, some parents might understand their custody rights as mainly allowing them to object to a future change of residence of the child. Under the aforementioned case law such parents would be precluded from requesting the return of the child at the time they intended to exercise their rights of custody. At the time the Convention

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[22] *Ministere Public c. MB*, Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, Mar. 23, 1989, *reprinted in* 79 Rev. crit. 529 (1990).

[23] "Report on the Second Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child* (18-21 January 1993)", drawn up by the Permanent Bureau, pp. 10-11.

> was drafted, "rights of custody" under Article 5 were deemed to cover cases where a parent had rights of access and the right to be consulted before a change of the child's place of residence. The requirement of actual exercise of custody rights under Article 3 b of the Convention in effect demands that the parent has maintained some contacts with the child.[24]

In 2006, the discussion of the issue arose in the context of the preparation of a *Guide to Good Practice on Transfrontier Contact Concerning Children*.[25] During the discussion the Permanent Bureau noted that a clear preponderance of case law supported the view that the combination of access rights with a veto on the removal of a child constituted a custody right for the purposes of the Convention. The ensuing discussion can be found in the report:

> Some participants emphasized the importance of resolving the conflict in case law regarding this aspect of the definition of custody. Several experts explained that in their States, the meaning of access / contact rights in relation to custody rights was not an issue in itself where parents both exercised their parental authority

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[24] "Report on the Third Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child* (17-21 March 1997)", drawn up by the Permanent Bureau, pp. 7.

[25] *Guide to Good Practice on Transfrontier Contact Concerning Children*, Jordan Publishing, 2008. Also available on the Hague Conference website <www.hcch.net>, under "Child Abduction Section" and then "Guides to Good Practice".

> over the child, where the child was removed without the permission of the left-behind parent and the latter would ask for the return of the child, based on a right of custody arising from his / her parental authority. One expert underscored that concepts such as "parental responsibility" have evolved since the 1980 Convention was adopted and that it was important to keep these changes in mind in the application of the Convention.[26]

The Special Commission also approved the publication of the *Guide to Good Practice on Transfrontier Contact Concerning Children*, which contains a statement that:

> The preponderance of the case law supports the view that a right of access combined with a veto on the removal of a child from the jurisdiction constitutes a custody right for the purposes of the 1980 Convention.[27]

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[26] "Report on the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the Practical Implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006)", drawn up by the Permanent Bureau, March 2007, para. 212

[27] *Guide to Good Practice on Transfrontier Contact Concerning Children*, *supra* note 10, at p. 43.

The guide goes on to explain further that the opposing view does not command widespread support.[28]

CONCLUSION

In light of the above arguments the Permanent Bureau respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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December 17, 2008

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[28] *Ibid.*

JOINT APPENDIX

(8)

No. 08-645

Supreme Court, U.S.
FILED
SEP 15 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,

Petitioner,

v.

JACQUELYN VAYE ABBOTT,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

JOINT APPENDIX

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[1] Several of the documents in the Joint Appendix refer to the child by his full name; those references have been replaced with his initials. Likewise, references to the child's date of birth have been replaced with the text "XX, 1995", and references to his home address have been replaced with the text "XX."

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U.S. District Court
Western District of Texas (Austin)
CIVIL DOCKET FOR CASE #: 1:06-cv-00359-LY

Date Filed	#	Docket Text
05/11/2006	1	COMPLAINT (filing fee $ 350 receipt number 385672), filed by Timothy Mark Cameron Abbott.(af,) (Entered: 05/12/2006)
09/11/2006	4	ANSWER to Complaint by Jacquelyn Vaye Abbott.(td,) (Entered: 09/11/2006)
12/01/2006	8	AMENDED ANSWER to [1] Complaint by Jacquelyn Vaye Abbott. (td,) (Entered: 12/01/2006)
01/15/2007	12	TRIAL BRIEF by Timothy Mark Cameron Abbott. (Dyer, Adair) (Entered: 01/15/2007)
01/25/2007	13	MOTION *FOR TEMPORARY VISITATION* by Timothy Mark Cameron Abbott. (Attachments # 1 # 2 # 3)(Dyer, Adair) (Entered: 01/25/2007)
02/02/2007	15	RESPONSE to Motion re [13] MOTION *FOR TEMPORARY VISITATION*, filed by Jacquelyn Vaye Abbott. (Hays, Karl) (Entered:

		02/02/2007)
02/06/2007	17	ORDER denying [13] Motion for Temporary Visitation Signed by Judge Lee Yeakel. (jk,) (Entered: 02/06/2007)
02/14/2007	18	TRIAL BRIEF by Jacquelyn Vaye Abbott. (Hays, Karl) (Entered: 02/14/2007)
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General Docket
United States Court of Appeals for the Fifth Circuit
Filed: 8/6/2007

Court of Appeals Docket #: 07-50967

TIMOTHY MARK CAMERON ABBOTT,

Plaintiff - Appellant,

v.

JACQUELYN VAYE ABBOTT,

Defendant - Appellee.

08/09/2007	Private Civil Federal Case Docketed. NOA filed by Appellant Timothy Mark Cameron Abbott. [07-50967] (DMS)
11/19/2007	Appellant's Brief filed by Appellant Timothy Mark Cameron Abbott. Disk provided [Y/N]: N Sufficient: [Y/N]: Y [5899871-1] [07-50967] A/Pet's Brief ddl satisfied. E/Res's Brief due on 12/19/07 for Jacquelyn Vaye Abbott.
11/19/2007	Record excerpts filed by Appellant Timothy Mark Cameron Abbott. Disk Provided [Y/N]: N [07-50967] (RSM)
12/20/2007	Appellee's Brief filed by Appellee Jacquelyn Vaye Abbott. Disk Provided [Y/N]: Y Sufficient [Y/N]: Y [5923780-1]

	[07-50967] E/Res's Brief ddl satisfied. Reply Brief due on 1/3/08 for Timothy Mark Cameron Abbott. (MCS)
01/04/2008	Reply brief filed by Appellant Timothy Mark Cameron Abbott. Disk Provided [Y/N]: N Sufficient [Y/N]: Y [5933551-1] [07-50967] Reply Brief ddl satisfied. , (RSM)
02/25/2008	Unopposed motion filed by Appellant Timothy Mark Cameron Abbott to expedite oral argument [5968090-1] Date of COS: 2/22/08 Sufficient [Y/N]: Y [07-50967] (KSW)
02/25/2008	COURT Order filed granting unopposed motion to expedite oral argument [5968090-1] (PRO) Copies to all counsel. [07-50967] (RFP)
02/26/2008	Case tentatively calendared for oral argument Week of: 04/28/08. [07-50967] (GAM)
03/19/2008	Case calendared for oral argument. [07-50967] (PFT)
04/29/2008	Oral argument heard. Case argued by Adair Dyer for Appellant Timothy Mark Cameron Abbott, Karl Edward Hays for Appellee Jacquelyn Vaye Abbott [07-50967] (PFT)

05/12/2008	Supplemental authorities (FRAP 28(j)) filed by Appellant Timothy Mark Cameron Abbott. [6024896-1] [07-50967] (GLP)
08/15/2008	Supplemental authorities (FRAP 28(j)) filed by Appellant Timothy Mark Cameron Abbott. [6095310] [07-50967] (GLP)
08/20/2008	Supplemental authorities (FRAP 28(j)) filed by Appellee Jacquelyn Vaye Abbott. [6100029-1] [07-50967] (GLP)
08/27/2008	Response/opposition filed by Appellant Timothy Mark Cameron Abbott to Rule 28(j) letter filed 8/20/08 [6100029-1] by Appellee Jacquelyn Vaye Abbott Date of COS: 8/26/08 Sufficient [Y/N]: Y [6105307-1] [07-50967] (GLP)
09/10/2008	Supplemental authorities (FRAP 28(j)) filed by Appellant Timothy Mark Cameron Abbott. [6111025-1] [07-50967] (GLP)
09/16/2008	Opinion filed. Issds in T form? Y Mandate pull date is 10/7/08. [07-50967] (RMF)
09/16/2008	Judgment entered and filed. [07-50967] (RMF)

10/08/2008	Mandate issued. Approved BOC issued [Y/N]?: Y [07-50967] Mandate pull date satisfied. (GLP)
11/21/2008	Supreme Court notice that petition for certiorari was filed on 11/14/08 by Appellant Timothy Mark Cameron Abbott. Supct No.: 08-645 [07-50967] (CAV)
07/07/2009	SUPREME COURT ORDER received granting petition for writ of certiorari on 06/29/2009. [6316518-1] [07-50967] (CAV)
07/10/2009	CERTIFIED RECORD ON APPEAL TRANSMITTED to United States Supreme Court on 07/10/2009. 5th Circuit Volumes Transmitted: 1. [07-50967] (GLP)
07/10/2009	RECORD ON APPEAL REQUESTED from the district court for the Supreme Court. Record on appeal was requested. [07-50967] (GLP)

Sentence of Court Regarding Visitation Rights of Timothy Mark Cameron Abbott With Respect To His Son [A.J.A.]

30 Jan 2004
English

The following is notified to MR. CRISTIAN GUZMAN ZUMARAN, representative for the plaintiff, Timothy Abbott:

SUBJECT: DIRECT AND REGULAR VISITING SCHEDULE
MINOR: [A.J.A.]
CASE NO.: 40,075-03

La Serena, January 30, 2004

IN VIEW OF:
First: On page 1, Mr. Timothy Mark Cameron Abbott, British, domiciled at Pinto Mister Row 1220, Apartment 303, San Joaquín, La Serena, petitioned for a direct and regular visiting schedule by the Court in order to be able to spend time with his son, [A.J.A.], aged 7, born XX, 1995 in Hawaii, United States, a relationship that is proven on page 9 by a copy of the minor's certificate of birth, legalized by the Ministry of Foreign Relations. His petition is based on the fact that the minor currently lives with his mother, a person against whom he is suing, Jacqueline Vaye Abbott, American, both domiciled at Luisa Kneer 2805, La Serena, and it is his desire to

share every Wednesday with his son, every other weekend as of Friday from 8:00 p.m. to 8:00 p.m. on Sunday. He also petitioned to be the one to take the minor to, and pick him up from, school, for which he promised to pick him up from his mother's home, drive him to school and later pick up the minor to return him to home. If he is unable to do so for any reason, he asked that the minor be transported in a school bus or by the means that the mother deems pertinent, and he will pay for the requested service.

Second: On page 9, the respondent responded in time and form, stating that she rejected the father's claim as from the moment she married him, she has been the victim of domestic violence by the plaintiff, which did not cease after the arrival of the child into their lives. She explained that the child has also been the victim of physical and psychic abuse by the father. She opposed the plaintiff seeing the child temporarily, given the recent separation.

Third: On page 33, a conciliation and evidentiary hearing was decreed and a psychosocial report requested on the parties from the Family Orientation and Diagnostic Center (CEDOF).

Fourth: On page 22, a conciliation and evidentiary hearing was held at which the parties were called upon to reconcile, which did not occur. The reply to interrogatories continued for the plaintiff, in which the respondent deposed and recognized the existence of physical ailments, of depression, adding brief explanations of her experiences, her previous marriages and their break-up, as well as the activities she has conducted in her life.

Fifth: On page 25, testimony continued to be received on behalf of the plaintiff, who presented two witnesess from his list, Hugo Emond Schwartz and Gelys Trancho Lemes, who agreed that they know the plaintiff, the minor and the mother, stating that the plaintiff is a quiet, balanced person and his nature differs much from that of the respondent. It was prudent for the father to be able to visit his child, which may be weekends from Friday until Sunday, and one business day, which may be a Wednesday or Thursday, in order to help the child in his schooling and give him the opportunity to spend the night at his father's home. They explained that the child is at an age when he asks a lot of questions that his father always answers and thus teaches him new things.

Sixth: The hearing continued on page 60, the respondent giving evidence. The list witness declared, María Constanza Pinto Martínez, psychologist, who said that she knows the minor and his parents, who were referred from the school where the minor attends, the International School. She stated that the minor must be protected until it is clear that the father can control himself in conflictive situations. He explained that the minor was referred to her office because of behavioral problems at school, due to adaptation to his surroundings. After being referred for an evaluation, she found that the minor had an intense temperament, showed signs of anxiety that resulted in impulsive behavior. The mother is an intelligent woman, suggesting that if the father wished to see the minor, he receive appropriate assistance in regard to demonstrating his ability to control himself under pressure and thus be able to calm his child down since the minor because anxious

when seeing his father violent and alone. The foregoing notwithstanding, she said that her function was to make a psychological evaluation of the minor and not a psychological profile of the parents since of the 22 sessions she had held with the minor, she had the opportunity to talk to the mother and inevitably form a profile of her, and thus understand the father as well through impressions and references only. Nonetheless, she suggested that the father receive a psychiatric and psychometric evaluation.

Seventh: On pages 36 to 40, the plaintiff provided documentary evidence, consisting of a copy of a doctor's certificate describing the ailments of the respondent, which stated that the mother suffers from acute lumbago, plus three photographs of the minor with his father.

Eighth: On pages 14 to 28, the respondent provided a certificate explaining the importance that the father undergo a psychiatric and psychometric evaluation, which stated that there were moderate injuries to the respondent, information from foreign doctors, specifically in Hawaii, mentioning injuries suffered by the respondent, a police report on injuries suffered, a copy of a pleading in a criminal complaint before the arraignment court against the plaintiff, and a copy of the claim for infringement of Law 19,325, filed in the First Civil Court of La Serena.

Ninth: As a measure to make a better resolution, it was decreed that the father undergo a psychiatric and psychometric evaluation by the Legal Medicine Service.

Tenth: On page s 68 to 73, a psychosocial report was added, prepared by CEDOF, proposing that the father be granted visiting rights because he

represents no danger to his child but rather quite the contrary, it says that the father and son manifest a stable and secure bond.

Twelfth: On page 77, provisional visits were granted to the minor, the first and last Saturday of the month as of 3:30 p.m. through 5:00 p.m.

Thirteenth: The provisional settlement on visits was added to the case file on page 85, reached by the parties where the father may withdraw the minor on Sundays from the mother's home or wherever he is as of 10:00 a.m. to 7:00 p.m. of the same day, the visits being supervised by a couple who are friends of the minor's parents. The parties further agreed that on August 9 and 23 and on September 20, 2003, the father and any of his friends who will supervise the visits may withdraw the minor from the mother's home or wherever he is as of 2:00 p.m. on Saturday until 7:00 p.m. on Sunday.

Fourteenth: On page 112, the respondent petitioned the court to decree the immediate return of the minor, who was not returned by the father on the appropriate day and time while on visit. On page 138, the parties were convened to a hearing decreed for January 19, at 10:00 a.m. and the minor was summoned to appear. On pages 114 to 115, a record was made of a report filed by the respondent with the police that there was a breach of the schedule agreed upon provisionally by the parties. The hearing was held on page 149, attended only by the respondent, who was awarded immediate custody of the minor on page 150 based on the information.

Fifteenth: On page 173, a report was issued by the Legal Medicine Service suggesting that visits be authorized between the parent and child, which shall

be weekly and for a vacation period not exceeding 2 weeks, although it recommended family mediation among the parties in order to reach agreements regarding the breeding and care of the minor.

Sixteenth: On page 172, the minor was convened to a hearing with the judge, appearing on page 200, stating, in regard to visits, that he wanted them to be long, that he wanted to be with his father, it was good because he was always happy. He also said that he had toys and things at the plaintiff's home when he goes there.

Seventeenth: The parties were convened to hear a decision on the back of page 201.

Eighteenth: It is a right of the child embodied in the International Convention on Children's Rights, and in our legal system in article 5, second subparagraph of the Political Constitution of the State, to maintain a direct and regular relationship with the parent who does not have custody.

Nineteenth: Given the merit of the information provided in the proceedings and appreciated in conscience, it is deemed that there was no proof that the father was not qualified to exercise the aforesaid right through a visiting schedule.

Twentieth: The minor has clearly stated his intent to have ample contact with his father.

Twenty-First: This judge has concluded, from a hearing with the minor, that [A.J.A.] has a deep need to maintain a close tie with his father, and given the events that are reported on page 112 et seq., he may be affected by distrust and resentment between his parents. Hence, in view of the child's welfare, which must be primordial among the parents, the court urges them to maintain an animosity-free

relationship that will allow for the tranquil development of the visiting schedule, which should be fulfilled strictly; and she agreed with the conclusion of the Legal Medicine Service, recommending that the parties attend some family therapy in order to reach minimal agreements in relation to breeding and implementation of the visiting schedule.

Twenty-second: Bearing in mind that the parties have been unable to put the child's interests ahead of their own and have even tried to take the law into their own hands, the court will be the one to regulate the visiting schedule that it deems most appropriate, always taking into consideration the superior interest of the child, in view of the provisions in article 229 of the Civil Code, article 48 and 48-bis and other pertinent articles of Law 16,618, amended by Law 19,711, which governs the matter in this case. IT IS THUS DECIDED THAT:

Based on the information in the case and appreciated in conscience by the court, the claim of the father is granted to maintain a direct and regular visiting schedule with his son, [A.J.A.], provided he adheres to the following visiting schedule:

(a) Every other weekend from 8:00 p.m. on Friday to 8:00 p.m. on Sunday, starting with the weekend of February 6th of this year. The father must return the child to the mother's home personally at the decreed time; and

(b) On Wednesdays, from the time school ends until 8:00 p.m. The father must pick up the child at school and later return him to the mother's home at the time decreed for that day.

The representative of the parties must be notified through the Court Process Server.

To be annotated, an authenticated copy recorded, and the information filed at the pertinent time.

RENDERED BY AMAYA MORRAS RATHBERGER, DEPUTY FAMILY COURT JUDGE. AUTHENTICATED BY JORGE ROJAS RAMOS, DEPUTY CLERK.

THIS COPY OF THE DECISION ON PAGE 203 to 206 in case No. 40075-03 in regard to the visiting schedule with the minor [A.J.A.] is in agreement with the original. La Serena, January 21, 2004.

Carlos Soto Leiva
Visiting Process Server
La Serena Family Court

Sentence of Court Regarding *La Tuición* or Personal Care of [A.J.A.]

22 Nov 2004
English

I hereby notify the following to MR. MANUEL BLANCO P. and MR. CRISTIAN GUZMAN Z., attorneys for the plaintiff, Timothy Abbott, domiciled at Pintor Mr. Row 1220, Apartment 303, San Joaquín, La Serena:

La Serena, November 22, 2004.

IN VIEW OF AND BEARING IN MIND THAT:

First: On page 3 et seq., Mr. Timothy Mark Cameron Abbott, astronomer, domiciled at Pintor Mr. Row 1220, Apartment 303, San Joaquín, La Serena, is suing for the custody of his son, [A.J.A.], born XX, 1995, 9 years of age, whose certificate of birth is on page 1 and the translation thereof on page 31 et seq. He bases his action on the fact that the minor lives with him, according to a certificate of residence provided on page 2, pointing out that the mother is disqualified to have custody of their child in common since she does not meet the requirements to take proper personal care of the child and because, according to social, psychological and school reports, it has been demonstrated that the minor has been gradually losing over time the stability he had prior to the separation, when custody was exercised by the father. He is at this time and has been solely in the care of the mother for nearly one year, who has done

nothing more than aggravate the condition of the minor that nowadays puts him at serious risk in his personal development, including his physical health and, above all, mental health. It is added that the father pays a monthly sum exceeding CH$1,500,000 and even so, the mother has not demonstrated her ability to educate and provide a social and psychological stability that is required by the minor in this case, despite having such supply of funds every month, thereby demonstrating that she cannot, and is evidently unable, to handle the personal care of the child, pointing out that the mental health of the minor in question has been severely impaired because of the restricted visits he has with his father, whom he loves and wants to be with him above all at all times, which the court will be able to see at the time the minor is interviewed, his conclusion being that the father must have custody since the mother has had all material and social means available to care properly for the minor and has not done so, aggravating his condition, both emotionally as well as academically. In addition, in the care of his mother, the minor has lost all direction in regard to his integral development, specially emotionally, socially and educationally, since he has set himself apart from his network of friends. And one of the principal causes of neglect by the mother of her son is her self-medication, a deterioration in her mental health, which has caused a drop in his academic performance and disfunction in his academic and extracurricular development. He ends by pointing out that the minor himself has stated spontaneously his desire to be permanently with his mother and that the mother enjoy an appropriate visiting schedule. As a corollary

to the foregoing, by living with his father he is sure of having both parents while being with his mother, the minor knows that he will lose his father because she intends to move to the USA, to the State of Texas, which has not signed or ratified international treaties wherefore any attempt to compel compliance with a visiting schedule regulated in Chile will be completely useless in that country and the minor knows this. The plaintiff therefore concludes that the minor has not only diminished his capacities in the care of his mother but his mental and moral integrity have also been placed at serious risk, weakening, because of his poor care, his development, not only socially but morally because his paradigms of behavior are distorted by the environments in which he has had to develop and where he should obtain the elements necessary for his appropriate development that, of course, are not included because of the inappropriate care provided thus far by the mother. It is petitioned that it be considered that at this time, on the date the claim is filed, the minor is with his father and does not wish to live with his mother. He has a confusing and disagreeable environment with his mother that the child himself despises and he wants to recover the environment provided by this father, a tranquil one endowed with the elements more than necessary for his appropriate and balanced development, both socially as well as emotionally and psychologically. It is petitioned that a de facto situation be recognized that benefits the child since the father meets all requirements to have appropriate custody, specially because the minor so wishes.

Second: On page 52 et seq., the respondent answered the action filed against her, pointing out that the parties have been separated since 2003 and that what he asserts in the pleading of the claim is false since the mother does not suffer from any disqualification in exercising custody of her child, the minor in the case. The disposition of the mother has been that episodes of family violence and a subsequent rupture of the marriage affect the minor as little as possible and in that intent, a provisional settlement on visits was signed, which was determined for a period of 8 weeks as of August 1, 2003, under which the father could withdraw the minor from the maternal home or from wherever he was every Sunday from 10:00 a.m. to 7:00 p.m. of the same day and on the weekends of August 9 and 23, 2003; from 2:00 p.m. on Saturday to 7:00 p.m. on Sunday. Such schedule has been implemented normally and the minor was sharing Christmas and New Year's with his father, the father finally picking up the minor on January 3, 2004, at around 4:00 p.m. under the commitment to return him to his mother on Sunday at 7:00 p.m., which he did not do despite the different promises made by the father tor return the child to the mother. What happened was that the father did not intend to return the minor since in the interim, a custody claim was filed, which was notified to the mother under specious arguments as he promised to return the child. The mother was notified by a private process server of the claim filed against her wherefore the claim in this case in that the father lives with the child is untrue. The mother was only able to recover her son through the police under an order which was enforced after several

hours of negotiation, returning the minor to live with his mother, which had always been the case. She pointed out that the father pressured the minor psychologically at all times to choose between one parent or the other, and she was only able to be reunited with her son after a lamentable spectacle between the police, neighbors and locals in the location. She asserts that the minor suffers from a severe lengthy depression, which has caused a drop in his academic performance and was treated by the psychologists at the International School, the establishment where the minor is studying in the second grade. This psychologist referred him to Lidia Wettlin F., a neuropsychiatrist, who has been treating him since June 2003 with the support of drugs. Therefore, the mental health of the child in this case has not been impaired because of the mother or because of the restricted visits by the father, but rather he is adversely influenced by the father's attitude of trying to convince him that he is better with him than with his mother.

Third: As no settlement was reached among the parties, the case moved on to the evidence stage and continued being processed.

Fourth: The parties provided in the case file documents on behalf of the plaintiff, consisting of photographs of the minor with his father and a group of friends, which shows an appropriate parent-child relationship, and the relationship with children of his age is normal in the development of the minor. On page 81, the respondent provided a certificate by Dr. Wettlin that she has seen the child in this case professionally, and that he has been diagnosed with a severe depressive disorder secondary to family abuse

that has been going on for a long time, and he is undergoing drug treatment since the child is highly irritable and has great mood swings. The mother is the one who takes him to doctor's visits and he has not missed any; a certificate of psychological care issued by the professional M. Constanza Pinto M.m who is seeing the minor for a depressive disorder associated with family difficulties that have been recurrent over time. The respondent submitted a certificate on page 84 in which Dr, Isobel Meikle J. certifies that the mother is in good physical health and is the carrier of a Type III Ehlers-Danlos Syndrome that has no effect on her daily life. On page 97, the minor in this case was called to the stand, who said that he was upset at being removed by the police and at being in the midst of a conflict between his parents whom he loves equally, and his wish is that the family again be reunited. He currently lives with his mother, he has a pet and does things normal for his age. The court was able to appreciate a minor who was clearly aware of his particular reality and clear about the feeling he has for both of his parents, even though they are separated.

Fifth: On pages 184 to 187, the respondent replied to interrogatories after a second summons, who responded under oath to facts relative to her father in that he has been married more than once, has not received treatment for drugs; that her mother has been divorced twice, that she was adopted by her parents, that her first husband was a homosexual, that it is not true that she had an abortion during her second marriage nor has she suffered from depression, that she has another child in shared

custody with the father and that child is a normal person; and that she was treated with Ritalin previously under a doctor's prescription without knowing whether it was a psychotropic drug; that she is not very close to her brother and does not know the orders that he received from the army regarding her behavior; that it is true that while she was married and living in Hawaii, she traveled for work for a period of two months to Hollywood, leaving the minor in the care of his father and friend, who was paid, but who could not be considered a "nanny" since the father had to be absent from the home because of his job; in any case, while the child was small, he was always under her direct care; it is not true that she tried to commit suicide nor that she has marks on her body of this; that she did learn to read as a child but this does not mean that she read adult material but rather child material; that she has worked as a paralegal and secretary in the Baptist Church; that the medication she has given her son, the minor in this case, was prescribed by doctors in the respective prescriptions and she has not requested authorization from the father of her child, the claimant in the proceedings, since he is an astronomer and not a physician. She clarified that the medical treatment of her son was known to the father and that such medical prescriptions were sent by Dr. Isobel Meichle to the knowledge of the neuropsychiatrist seeing the minor, Dr. Wettlin. It is not true that she was willing to help anyone who has health problems and she could not issue prescriptions or prescribe medications since she is not a doctor. The same holds true for drugs. Nor is she able to establish whether a person is suffering from

schizophrenia or is bipolar since she is not a psychiatrist and she did not know that the mediation prescribed for her child was for people suffering from schizophrenia. She administered that medication to her son because it was given by the attending physician and her son suffers from behavioral problems, but not from any disease. She knows of the medication Risperidone and explained that it was given her by the attending physician. The entire medical treatment of her son has been explained to his father, but she does not remember the name of the medication that it was at some time prescribed to her in her medical treatment. In regard to recognizing depression in other people, she answered that she is not a physician capable of recognizing that illness and she has not been hospitalized for suicide. Her amorous relations have been entirely normal. The fire of which she was accused was accidental and she was 13 years old and it was the result of grease on the stove. She is knowledgeable as a translator of medical matters, but she is not a physician. Tt is true that there are certain health problems in her family which are treated by a medical prescription that supports the medication, and her mother has had two heart attacks and is being treated medically for heart problems, but it is not true that she takes tranquilizers.

Sixth: The plaintiff responded to interrogatories on page 115 et seq., who declared that on the days indicated in the interrogatory, he withdrew or delivered the minor at his mother's home; that he did not know that the minor was receiving psychological treatment or neuropsychiatric treatment and that during February 2004, he deposited the sum of

CH$500,000 in the respondent's account, apart from other payments which he does not remember.

Seventh: On page 115 et seq., a witness for the respondent was heard. María Constanza Pinto Martínez deposed, who was objected under article 358.4 of the Code of Civil Procedure. Such objection was not sustained because there is no dependent relationship with the person presenting her but rather merely a professional and contractual relationship that is reflected in the report provided on page 82 et seq.; and the witness John Alexander Logal was also objected to by the other party pursuant to article 358.4 of the Code of Civil procedure, which was not sustained by the court since there is no dependent relationship as invoked, but rather merely a professional relationship. Mrs. Pinto declared that she has personally seen the minor, who she finds to be damaged by the different conflicts between his parents. He has not, therefore, had a childhood like any normal child must have and the perception she has of the father is in relation to information provided in her visits with the minor, where there might be prepping by any of the parents, but not so with the material used, where there are also elements that tend to indicate possible aggressive and impulsive behavior in the father as well as amorous elements in the father-son relationship. The same with the relationship with the mother. She added that in regard to the father, it is preoccupying to see that he is losing, under emotional pressure, the ability to perceive the need for stability, recognition, security of the minor in the case, his son. The mother is able to assume the custody of the child. The father could have custody if

he had the intent and willingness to be advised and conduct himself not only with the child but also with the child's mother in a predictable way that would enable them to restore conversations of trust and where the interests of the child will prevail; and he were capable of sustaining a consistent conduct after different situations of pressures. In that case, he would be able to have custody of his child. She based that appreciation on the information provided by the mother and the conversations with the child through the support therapy sessions. Such content cannot be induced by the mother because of the material methodology used in therapy. In addition to the conduct of the father in interviews held with him and references from other professionals on his approach to interviews, such as Dr. Wettlin and the psychologist at the child's school, Alejandra Sorens. Catriona Hope Macfarlane finally declared, who was objected pursuant to article 358.7 of the Code of Civil Procedure, in view of the intimate friendship she has with the person presenting her. When the notice was answered, it was pointed out that the witness also has a friendship with the plaintiff and the friendship was based on the marriage of both, so the impartiality necessary to declare is not affected. In view of the responses by the witness, the court deemed that there were no serious facts that took away the witness' impartiality, so her declaration will be taken into account in the construction of this ruling and the objection filed against her was dismissed. The witness declared that the mother does not suffer from any inability to care for her child, that it is the mother who has the care of the child. Witnesses were then heard on the part of the

plaintiff, which was done on page 136 et seq., who were not objected. Hugo Emond Schwarz, Claudia Paola Sanhueza Rosales, María Angélica Molinos Castellano, Pedro Andrés Sanhueza Pérez, María Cecilia de Lourdes Santander Peralta, Roberto Christopher Smith all deposed and agreed on the points that were presented that the minor would be better with his father, who is concerned with his welfare. There is a very good affectionate relationship between them, the father is very concerned for the welfare of his child, including nutrition, spending recreational time together, and the father at this time is very worried that the minor be comfortable and at ease. The child behaves affectionately towards his father and the father is sufficiently calm in highly aggressive situations with the child, without specifying them. When the child must return to his mother's home, he tends to become tense, very nervous and does not seem to be a relaxed child.

Eighth: The cause was reviewed regarding regular visiting rights in respect of the same minor in the case, where there is a fixed relationship and an increase is currently being petitioned. A report by the Legal Medicine Service is pending for a conclusion. On page 191 et seq., an expert psychiatric report was added on the parties in the process, which concluded that none of the parents suffers from any absolute psychopathological impediment to assume full responsibility for the minor. It is obvious that they each take away the other's authority and that they do not cooperate in the care of the minor, and it is suggested, for his

emotional health, that the minor have contact with both parents and receive psychological care.

Ninth: The parties were convened to hear a decision on page 218.

Tenth: It can be assumed from the family situation of the respondent that the minor would be in good care with her since the father lives alone and must work, so it is presumed that he will be in the care of a third person other than his mother, who does not work, wherefore she has sufficient time to be able to be with, spend time with, and help her child.

Eleventh: On page 199 et seq., it is petitioned that several circumstances be taken into account on which the decision was to consider them as pertinent and according to the merits of the decision, such arguments were taken into consideration at the time thereof.

Twelfth: Under the conditions described above, taking into account that the primordial issue in determining the personal care of the minor is the superior interest thereof, who should enjoy the care of whoever is best able to provide it, it is not appropriate to sustain the petition on page 3 et seq. The direct and regular visiting schedule is regulated according to the stipulations in case No. 40075-03, notwithstanding the decision on the modification claimed by the father in order to maintain a father-son relationship.

It is concluded from the evidence presented in this case that there is an obvious disagreement and disharmony between the parties in being able to maintain a dialog to the benefit of their child in common, who has absorbed a large part of the conflicts of his parents and feels himself to be in the

midst of a great conflict that has repercussions on his actions and makes medical and professional care necessary in order to be able to understand and overcome the emotional burden that both parents have placed on the child by attitudes that are not the most recommendable in the raising of a minor who is at the age where he is being integrally formed. This undoubtedly has subsequent repercussions on his adolescent development, and later on his attitude that he will have as an adult when facing life, showing signs of the divorced-parents syndrome. The minor is significantly more emotionally tied to his mother, who has assumed his breeding in a totally satisfactory way. There is no legal impediment against her having custody. The fact that she has had more than one marriage does not predispose her to being a neglectful or irresponsible mother, and her actions demonstrate quite the contrary.

And also in accordance with the provisions in article 225 et seq. of the Civil Code, article 680 et seq. of the Code of Civil Procedure, Law 16,618 and the Convention on the Rights of the Child, it is resolved that:

I. The objections filed against the witnesses for the respondent, María Constanza Pinto Martínez, John Alexander Logan and Catriona Hope Macfarlane, are not sustained since the presumptions for disqualification invoked are not present as contained in article 358.4 and 358.7 of the Code of Civil Procedure.

II. The claim on page 3 et seq. is not sustained, made by Timothy Mark Cameron Abbott, and the custody of his child, [A.J.A.], corresponds to his mother, Jacqueline Vaye Abbott, because no

disqualification in exercising her role of mother was proven in relation to the minor in this case, and both the parents as well as the child must undergo private therapy since their economic situation allows.
III. The direct and regular visiting schedule in favor of the father is not regulated since it is already determined in case No, 40075-03, which was reviewed.
IV. Each party shall pay his/her costs because there were plausible reasons for litigation.

To be annotated, an authenticated copy recorded and a copy issued and notified by the Court's Visiting Process Server to the representatives of the parties.

RESOLVED BY VANESSA VACCARO CRESPO, PRESIDING FAMILY COURT JUDGE, AUTHENTICATED BY JORGE ROJAS RAMOS, DEPUTY CLERK.

THE COPY OF THE DECISION ON PAGES 219, 220, 221, 222, 223, 224, 225, 226, 227 AND 228 of case No. 41553-04 for custody of the minor, [A.J.A.], is in agreement with the original. La Serena, November 24, 2004.

Family Court Judge
Visiting Server

Sentence of Court Regarding Visitation Rights of Timothy Mark Cameron Abbott With Respect to His Son [A.J.A.]

9 Feb 2005
English

The following is notified to MR. MANUEL BLANCO PASTEN and MR. CRISTIAN GUZMAN ZUMARAN, representatives of the plaintiff, Mr. Timothy Abbott, domiciled at Pintor Mr. Rou 1220, Apartment 303-C, La Serena:

La Serena, February 9, 2005.

IN VIEW OF AND BEARING IN MIND:

First: On page 220 et seq., Mr. Timothy Mark Cameron Abbott, employee, doctor in astronomy, domiciled at Mr. Rou 1220, Apartment 303-C, San Joaquin, La Serena, is claiming an increase in the direct and regular relationship he has in respect of his son, [A.J.A.], and he filed his action against Jacqueline Abbott, mother of the minor, housewife, both domiciled at El Santo 1775, Apartment 502, La Serena, since the direct and regular relationship he currently has with his son is insufficient as the days assigned for his visits keep him from satisfactorily fulfilling his parental duties in regard to personally seeing to the raising, education and health and, above all, the instillation of values that must be transmitted from generation to generation, the history of the family to which he belongs, which is

necessary for the history and identity of the child himself. On the other hand, the plaintiff adds that he suffers from no impediment or incapacity in exercising the right he is claiming as he is personally handling payment of the education, board, clothing, housing, health, recreation, insurance, etc., claiming a change in the right that is sought to withdraw him from the mother's home from Friday after the school day or at 7:00 p.m. until Sunday at 8:00 p.m. in winter an 10:00 p.m. in summer. The child will spend the night in his father's home; during winter vacations, from 8:00 p.m. on the day vacation begins, to return him at 8:00 p.m. on the day that the first week ends; during national holidays, from 10:00 a.m. when the holiday starts until 9:00 p.m. of the end of the first week, in order to alternate the second week of these vacation periods with the other parent; in summer vacation, from 9:00 a.m. on January 2nd to 9:00 p.m. on January 31st, alternating with the other parent the time when the vacation period will be from February 1st until the previous day, alternating every other year with the other parent the time when the vacation period with the minor will be from February 1st until the day prior to the start of the school year, at 9:00 p.m. He also requests that he be allowed to pick up the child from school on Wednesday of each week after the end of the school day to spend the night at the father's home and take him to school the next day; on the father's birthday, to pick up the minor from school at the end of the school day, if pertinent, to return him at 9:00 p.m. on the same day; the same on the birthdays of paternal grandparents, without indicating any thereof; on father's day, on mother's day and on children's day,

as the case may be; on Thursday of Easter Week, with the right to pick up the child from school at the end of the school day and return him at 9:00 p.m. of the day of the Resurrection; and on October 31st after the school day, if pertinent, or at 5:00 p.m., to return him to the maternal home on November 1st at 8:00 p.m., the minor to spend the night with his father; alternating December 24th every other year to return to the maternal home at 5:00 p.m. on December 25th in order to celebrate Christmas; alternating every other year; to withdraw the minor on December 31st at 3:00 p.m. to return to the maternal home at 5:00 p.m. on January 1st in order to celebrate New Year's. **Second:** On page 229 et seq., he filed a motion of voidance of the actions in this cause on January 19, 2004 since a hearing was held for immediate delivery in order for the mother to be accompanied by police to remove the minor, ordering the parties to be notified by document for service and giving official notice to the police. He added that he was notified of such resolution several days after the hearing, so it was impossible to file the pertinent remedies, but an alleged official letter was sent and delivered to the representatives of the child's mother, who processed it by hand with the Police SIP Unit that does not specialize in minors, and such official letter was false, according to an investigation conducted by the assistant prosecutor, Ricardo Salinas, petitioning that such official letter be voided because of malicious use of a public instrument and forgery. After responding to the notice, he petitioned for rejection thereof because there was no alleged vice since the father was notified personally by the police of such resolution and such official letter was signed by the

deputy judge on that date and the deputy clerk of the court. As no further information was supplied and bearing in mind the copy of this related official letter, and as this information was known to the local district attorney's office, the order by this court had been fulfilled at the pertinent time and the minor was currently with his mother, which is why an increase or change in the visiting schedule between the father and his child is claimed, this court will not grant the voidance filed on page 229 et seq., without prejudice to what the local district attorney's office decides, as the case may be.

Third: On page 235 et seq., the notice is answered in relation to the change in the direct and regular visiting schedule, petitioning for rejection thereof since the decision that is to be modified, dated January 30, 2004, and the reasons that were taken into consideration at that time for its issuance, have not varied in terms that facilitate the change but rather on the contrary, visits must be restricted or suspended until the claimant fulfills his alimony obligation; moreover, the increase in attributions that the plaintiff in the motion is petitioning pursuant to articles 224 and 229 of the Civil Code grotesquely limits or restricts the provisions in article 225 of the Civil Code, which, in the case of a separation of parents, like what occurs in this case, surrenders the personal care of the raising and education of the child exclusively and solely to the other. This may be altered by the agreement of the parent or because the interests of the minor make it indispensable, either because of abuse, neglect or another qualified reason. The intent of the plaintiff to alter this is obvious by seeking to have, by mutual consent with the mother,

the personal care of the child and enforce the provisions in article 224 of the Civil Code in the actual situation, which, in the judgment of the respondent in the motion, is entirely unacceptable.

Fourth: As the respondent has opposed the motion substantially and pertinently, the points of evidence were set and a conciliation and evidence hearing set for June 23 at 9:00 a.m. The representatives of the parties were notified of such resolution by the court process server, according to the proceeding stamped on page 239 of the case file; the evidentiary decree on page 238 was repeated on page 255, adding thereto a point of evidence. The representatives were notified on the back of page 255 and a new date was set for the conciliation and evidentiary hearing on page 257, for August 30 at 8:30 a.m., according to a resolution on page 309 and 312 of the case file issued July 16 at 8:30 a.m.

Fifth: A conciliation and evidentiary hearing was held on page 314 et seq., but no conciliation was reached in regard to the matter. Testimony was heard on behalf of the plaintiff in the motion, deposing his witnesses on the list, Yessica Cecilia Loyola Espinoza and Keryma Andrea Araya Ríos, who agreed when stating that it is positive that a greater visiting schedule be established in view of the evolution in the child since in the beginning, he was withdrawn, aggressive and unsociable and now is more sociable, he relates to his peers and he appears to be happy. One of the witnesses declared that she saw him mainly on the week-ends and that in her judgment, the actual relationship between the father and child had to be expanded since when the child must return, he becomes moody, does not want to go

back, becomes angry, everything seems bad to him, and he suddenly stops the activities he is doing. On her part, the respondent in the motion presented a witness from the list, María Constanza Pinto Martínez, who declared that in her judgment, it would be prudent to maintain the actual visiting schedule, the principal reason being the relationship existing between the parents, referring to the ability to make decisions regarding the child which affects him. She said that the child loves his father, has a loving and playful relationship with him, but continues to show some fear of bewildering reactions thereof, which are largely directed towards the mother, which logically has an effect on the child. She said that the minor does not understand why gifts and clothes must be left at the father's house and why he cannot share them with his mother. She knows this and has evidence of it by references both from child as well as the mother. She added that as a psychologist, she has seen the child professionally, who is undergoing medical treatment with a neuropsychiatrist for mood swings that have occurred in strict association with the family violence situation, showing periods of greater irritability when his parents begin new episodes of conflict. She said that she was concerned with protecting more the child than the particular interests of each of the parents wherefore she said that the visits by the father must be highly structured by the courts so that he is careful in the handling of his own temperament and that both parents have the least opportunity for agreement between them. She stated the foregoing as she has known the minor for two years and has seen no improvement in the ability of the parents to

reach agreements. She says that the father does not measure the degree of frustration and anguish he causes in the child by his attitude, adding that if he is incapable of making decisions in favor of the child in daily activities, he will hardly be able to make them in other areas.

Sixth: On page 322 et seq., replies to interrogatories were conducted with the respondent in this motion. She pointed out that the land line she has in her apartment is known to the child's father and he calls every day. It is true that the father bought a cell phone for the child for his personal and exclusive use, but it is not true that she keeps that phone in order not to let him use it, but rather it is the child who does not always want to talk to his father. It is true that she has a sentimental relationship with another person but it is not true that the child has not been seen by Dr. Wettlin and that the reports that have been accompanied and signed by that doctor that have been prepared with information she provided. It is not true that she punishes her son for actions of his father. She talks to her son, explains things and the child understands. It is not true that she has forbidden him to enter the AURA building nor has she been expelled from the spouses' group of that entity. She explained that it is true that she told her son at one time that "I have stolen from your father," and this was because she was unable to buy things because he did not pay 35% of this salary, which is more than 4 million pesos, in an effort to pressure her to leave her without money in a country where she cannot work, stating that said expression has caused her much pain. It is true that she only allows her child contact ordered by the court since when she

surrendered him previously for four days, the father kept the child for 16 days, requiring an order from the court to return him to her. He took advantage of that period to file a claim in this court citing that she had abandoned the child, so she could not risk that the child disappear or the father traumatize him, and all she wants is to do things regularly and orderly for the child to have the greatest tranquility and security since he has less time with someone who cannot control himself, the child has improved in school and has actually changed schools, adding that the days that he is with his father he does not do his homework. She said that this child has behavioral problems and angers easily. It is not true that the child has not had a behavioral crisis since he relates more continually with his father, stating in particular an episode occurring on the child's birthday that was celebrated by his father as he did not let him take the gifts from his friends home. She clarified that she does not destroy [A.J.A.]'s toys, and in regard to the presumed frustration he would feel for his parents' separation, she said that it is not true since he currently has peace in his home. She said that 20 years ago, she was depressed, but overcame it. She does not take medication at this time because she does not need it.

Seventh: On page 334, it was certified that the evidentiary period was concluded and an expert report was pending that had been ordered from the Legal Medicine Service.

Eighth: On pages 336 and 337, a complete psychiatric report was provided on both parents, concluding that none of them suffers from an absolute impediment psychopathologically to have

full custody of the minor. It is obvious that there is a mutual resentment and lack of cooperation in the care of the minor and his emotional health. It was suggested that some measure be adopted to ensure contact by the child with both parents and that the child receive psychological care.

Ninth: On page 339, a conciliation hearing was convened, which was held on page 353, but no conciliation was reached, and on that same date, the deputy judge held a private hearing with the respondent in the motion and the minor in the case.

Tenth: On page 357, the case became ready for a ruling and the file was sent to the Court of Appeals, which was returned on February 2, the resolution in the case for a ruling governing as of that date.

After analyzing the information in the case file, in conscience, according to the provisions in articles 48 and 48-bis of Law 16,618 and articles 222,223, 224 and 225 of the Civil Code and the Convention on the Rights of the Child, it is resolved that:

A. The voidance filed on page 229 et seq. be dismissed.

B. Part of the claim in the motion is granted in regard to the right of a direct and regular relationship that the father will have with his son, which will be two weekends a month, the first and second of each month, from Friday at 5:00 p.m. to Sunday at 8:00 p.m., and the minor may spend the night with his father, as well as one week of winter vacation, the first week, from Friday at 5:00 p.m. for 7 days, to return him on the seventh day at 8:00 p.m.; Christmas alternated with the mother, starting this year, together with the father from 9:00 a.m. on

December 25th to 10:00 p.m. of the same day; on New Year's Day, alternating with the mother, starting this year with the father, from December 31, 2005 at 7:00 p.m. to 10:00 p.m. on January 1st of the next year (2006). The child may spend the night with his father; and one month of school summer vacation in February, from the first of that month at 9:00 a.m. until 10:00 p.m. on the last day of such month.

C. Each party shall pay his and her costs.

D. The minor shall be placed under psychological care in order to appropriately confront the conflictive behavior existing between his parents so that his integral development is not affected, which will be paid by the custodial parent.

The parties shall be notified through their representatives by document for service through the Court Process Server.

To be annotated and an authenticated copy recorded.

RESOLVED BY VANESSA VACCARO CRESPO, PRESIDING FAMILY COURT JUDGE.

AUTHENTICATED BY JORGE ROJAS RAMOS, DEPUTY CLERK.

THE COPY OF THE DECISION ON PAGES 376 to 381 in case No. 40075-03 for visiting rights of the minor [A.J.A.] is in agreement with the original.
La Serena, February 11, 2005

Carlos Soto Leiva
Process Server La Serena Family Court

CAUSE NO. 06-0146

IN THE DISTRICT COURT OF THE 274TH JUDICIAL DISTRICT OF HAYS COUNTY, TEXAS

IN THE INTEREST OF [A.J.A.], A CHILD

ORDER ON PETITION FOR TEMPORARY ENFORCEMENT OF ORDER FOR VISITATION ISSUED BY A COMPETENT COURT OF THE CHILD'S HOME STATE

On February 13, 2006 the Court heard this case Petitioner, Timothy Mark Cameron Abbott's Petition for Temporary Enforcement of Order for Visitation Issued by a Competent Court of the Child's Home State and for Temporary Restraining Order.

Appearances

Petitioner, Timothy Mark Cameron Abbott, appeared in person and through attorney of record, Adair Dyer, and announced ready for trial.

Respondent, Jacquelyn Vaye Abbott, appeared in person and through attorney of record, James L. Arth, and announced ready for trial.

Record

The record of testimony was duly reported by the court reporter for the 274th Judicial District Court.

Child

The Court finds that the following child is the subject of this suit:

Name: [A.J.A.]

Sex: Male
Birth date: XX, 1995

Findings

The Court finds that relief requested in the petition for temporary enforcement sought by Petitioner should be denied. IT IS ORDERED that all of the requested relief sought by Petitioner is DENIED. IT IS FURTHER ORDERED that the Petitioner should have liberal periods of possession while he is in the State of Texas for the remainder of the month of February, 2006. IT IS FURTHER ORDERED that Petitioner may not take the child from the State of Texas during his periods of possession. The parties are ORDERED to try to determine a schedule and terms for Petitioner to have possession of the child for the remainder of the month of February, 2006, and if the parties can not come to such an agreement, then the parties are ORDERED to return to this Court on February 15, 2006 at 9:00 a.m. for a further hearing before this Court.

Relief Not Granted

IT IS ORDERED that all relief requested in this case and not expressly granted is denied.

Date of Order

This order judicially PRONOUNCED AND RENDERED. In court at San Marcos, Hays County, Texas, on February 13, 2006 and further noted on the court's docket sheet on the same date, but signed on March 16, 2006.

/s/ _____
Charles Ramsey, Judge Presiding

APPROVED AS TO FORM ONLY:

/s/_____
Adair Dyer
State Bar No. 06320000
Attorney for Petitioner

/s/_____
James L. Arth
State Bar No. 01362900
Attorney for Respondent

CAUSE NO. 06-0280

IN THE DISTRICT COURT OF THE 274TH JUDICIAL DISTRICT OF HAYS COUNTY, TEXAS

IN THE MATTER OF THE MARRIAGE OF JACQUELYN VAYE ABBOTT AND TIMOTHY MARK CAMERON ABBOTT,

AND

IN THE INTEREST OF [A.J.A.], A CHILD

ORIGINAL PETITION FOR DIVORCE

1. Discovery Level

Discovery in this case is intended to be conducted under level 2 of rule 190 of the Texas Rules of Civil Procedure.

2. Parties

This suit is brought by Jacquelyn Vaye Abbott, Petitioner, Timothy Mark Cameron Abbott is Respondent.

3. Domicile

Petitioner has been a domiciliary of Texas for the preceding six-month period and a resident of this country for the preceding ninety-day period.

4. Service

Process should be served on Respondent at the Oak Inn, 1212 W. Ben White, Austin, Travis County, Texas.

5. Long-Arm Jurisdiction

Respondent is a non-resident of Texas. Petitioner is a resident or a domiciliary of Texas at the commencement of this suit.

6. Protective Order Statement

No protective order under title 4 of the Texas Family Code is in effect, and no application for a protective order is pending with regard to parties to this suit.

7. Dates of Marriage and Separation

The parties were married on or about November 01, 1992 and ceased to live together as husband and wife on or about March 13, 2003.

8. Grounds for Divorce

The marriage has become insupportable because of discord or conflict of personalities between Petitioner and Respondent that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation.

9. Children of the Marriage

Petitioner and Respondent are parents of the following child of this marriage who Petitioner while previously under the continuing jurisdiction of any the courts of the country of Chile, is not thought to be under the jurisdiction of those courts at the time this petition was filed:

Name: [A.J.A.]
Sex: Male
Birth Date: XX, 1995

There are court-ordered conservatorships, court-ordered guardianships, or other court-ordered

relationships affecting the child the subject of this suit.

Information required by section 152.209 of the Texas Family Code is provided in the affidavit attached as Exhibit "A".

By filing this petition, Petitioner asks the court to modify the terms of custody and possession, in accordance with §152.001 et seq. of the Texas Family Code. Petitioner specifically asks that the possession order be modified to conform to the Standard Possession order set out in the Texas Family Code and that the division of the rights and duties of each party as a parent be set out more particularly. Petitioner does not ask for any change to the child support ordered by the Chilean courts.

Information required by section 154.181(b) of the Texas Family Code is provided as follows: Petitioner maintains health insurance for the child through her place of employment through a group health insurance plan. It is believed that Respondent also has the child insured under a policy in Chile, though the terms and cost are unknown to Petitioner.

No property of consequence is owned or possessed by the child the subject of this suit.

The appointment of Petitioner and Respondent as joint managing conservators would not be in the best interest of the child. Petitioner, on final hearing, should be appointed sole managing conservator, with all the rights and duties of a parent sole managing conservator.

Respondent may violate the Court's order relating to Respondent's possessory interest in the child. Petitioner requests the Court to order Respondent to execute a bond or deposit security in a

reasonable amount, conditioned on Respondent's compliance with the Court's orders concerning possession of and access to the child.

Petitioner requests the Court to determine whether there is a risk of international abduction of the child by Respondent and to take such measures as are necessary to protect the child, including ordering that the child not leave Texas or the United States of America with the Respondent.

10. Temporary Orders

Petitioner requests the Court, after notice and hearing, to make temporary orders for the safety and welfare of the child, including but not limited to the following:

Enjoining Respondent from removing the child beyond a geographical area identified by the Court, acting directly or in concert with others.

Enjoining Respondent or any person acting on Respondent's behalf from disrupting or removing the child from the school or child care facility in which the child is enrolled or approaching the child at any location other than a site designated for supervised visitation.

Ordering passport and travel controls, including controls that prohibit Respondent and any person acting on Respondent's behalf from removing the child from Texas or the United States; require Respondent to surrender any passport issued in the child's name, including any passport issued in the name of both Respondent and the child; and prohibit

Respondent from applying on behalf of the child for a new or replacement passport or international travel visa.

Requiring respondent to provide:

a. to the United States Department of State's Office of Children's Issues and the relevant foreign consulate or embassy, written notice of the court-ordered passport and travel restrictions for the child and a properly authenticated copy of the court order detailing the restrictions and documentation of Respondent's agreement to the restrictions; and
b. to the Court, proof of receipt of the required written notice by the United States Department of State's Office of Children's Issues and the relevant foreign consulate or embassy.

Ordering Respondent to execute a bond or deposit security in an amount sufficient to offset the cost of recovering the child if the child is abducted by Respondent to a foreign country.

Authorizing the appropriate law enforcement agencies to take measures to prevent the abduction of the child by Respondent.

Including in its order provisions identifying the United States as the country of habitual residence of the child, defining the basis for the Court's exercise of jurisdiction, and stating

that Respondent's violation of the order may subject Respondent to a civil penalty or a criminal penalty or to both civil and criminal penalties.

11. Division of Community Property

Petitioner requests the Court to divide the estate of Petitioner and Respondent in a manner that the Court deems just and right, as provided by law.

Petitioner should be awarded a disproportionate share of the parties' estate for the following reasons, including but not limited to:

a. disparity of earning power of the spouses and their ability to support themselves;
b. the spouse to whom conservatorship of the child is granted; and
c. education and future employability of the spouses.

12. Separate Property

Petitioner and Respondent each own certain separate property that is not part of the community estate of the parties, and Petitioner requests the Court to confirm that separate property as Petitioner's and Respondent's separate property and estate.

13. Request for Permanent Injunction

Petitioner requests the Court, after trial on the merits, to grant the following permanent injunction:

a. That all possession of the child take place in the State of Texas.
b. That Respondent not be allowed to have possession of the child's passport.

c. That Respondent surrender his passport to Petitioner each time he exercises his possession in the state of Texas.

14. Request for Change of Name

Petitioner requests a change of name to Jacquelyn Vaye Duke.

15. Attorney's Fees, Expenses, Costs, and Interest

It was necessary for Petitioner to secure the services of James L. Arth, a licensed attorney, to prepare and prosecute this suit. To effect an equitable division of the estate of the parties and as a part of the division, and for services rendered in connection with conservatorship and support of the child, judgment for attorney's fees, expenses, and cost through trial and appeal should be granted against Respondent and in favor of Petitioner for the use and benefit of Petitioner's attorney and be ordered paid directly to Petitioner's attorney, who may enforce the judgment in the attorney's own name. Petitioner requests post-judgment interest as allowed by law.

16. Prayer

Petitioner prays that citation and notice issue as required by law and that the Court grant a divorce and all other relief requested in this petition.

Petitioner prays that, on final hearing, the Court enter a permanent injunction enjoining Respondent, in conformity with the allegations of this petition, from the acts set forth above.

Petitioner prays that Petitioner's name be changed as requested above.

Petitioner prays for attorney's fees, expenses, and costs as requested above.

Petitioner prays for general relief.

Respectfully Submitted,
/s/
James L. Arth
State Bar No. 01362990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A06CA359 LY

TIMOTHY MARK CAMERON ABBOTT

Plaintiff,

v.

JACQUELYN VAYE ABBOTT,

Defendant.

ORIGINAL COMPLAINT AND PETITION FOR RETURN OF CHILD PURSUANT TO THE INTERNATIONAL CHILD ABDUCTION REMEDIES ACT, 42 U.S.C. §§ 11601-11610, AND THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION ("THE HAGUE CONVENTION"), A MULTILATERAL TREATY

1. This Complaint and Petition is brought by the Plaintiff, Timothy Mark Cameron Abbott ("Tim") under Title 42, United States Code, Section 11603(a) and (b) seeking the return to the Republic of Chile ("Chile") of Plaintiff's son, [A.J.A.], age 10, who was born on XX, 1995 at Hilo, Hawaii. This Section provides for jurisdiction "in the place where the child is located at the time the petition is filed", which

is in the City of Dripping Springs, Hays County, Texas, within the jurisdiction of this court and of its Austin Division.

2. [A.J.A.] was removed from Chile, without his father's consent or knowledge, by his mother, Jacquelyn Vaye Abbott ("Jackie"), who is the Defendant in this case, on August 26, 2005. At that time [A.J.A.] was habitually resident in Chile, where he and both of his parents had lived for more than three years. His removal was in breach of "rights of custody", within the meaning of Articles 3 and 5 of the Hague Convention, attributed to his father and to the courts of Chile under the law of Chile

3. The rights of custody mentioned above were being actually exercised at the time of [A.J.A.]'s removal and would have continued to be exercised but for his removal. [A.J.A.] was removed to the United States of America ("USA") and is believed to be living with his mother at XX, Dripping Springs (Hays County), Texas 78620.

4. The Hague Convention (a copy of the text of which is attached hereto and marked "Exhibit A") has been in force between the USA and Chile at all times relevant to this proceeding. This treaty entered into force for the USA on July 1st, 1988, and entered into force between the USA and Chile on July 1st, 1994.

5. Plaintiff requests that Defendant be cited to appear and answer in this cause, and that following a hearing, the court order the return of [A.J.A.] to Chile forthwith, pursuant to Article 12, first paragraph, of the Hague

Convention, that Plaintiff be awarded his necessary expenses pursuant to Article 26, fourth paragraph, of the Hague Convention and 42 U.S.C. § 11607(b)(3), and that Plaintiff be granted such other and further relief as he may be entitled to.

Respectfully Submitted,
/s/
Adair Dyer,
Attorney for the Plaintiff,
Timothy Mark Cameron Abbott

State Bar of Texas No. 06320000
P.O. Box 30020
Austin, TX 78755-3020
Telephone (512) 343-7899
Fax (512) 343-7299

DECLARATION OF TIMOTHY MARK CAMERON ABBOTT

Timothy Mark Cameron Abbott ("Tim") hereby makes this affidavit the 16th day of August, 2006, in support of his application for the return of his son, [A.J.A.] from the United States of America ("USA") to the Republic of Chile, and shows as follows:

1. Tim and Jacquelyn Vaye Abbott (Jackie) were married in England on the 1st day of November, 1992. Their only child, [A.J.A.], was born in Hilo, Hawaii, USA, on the [XX] day of [XX], 1995. Tim, Jackie and [A.J.A.] subsequently lived together in the Canary Islands (Spain) and in La Serena, Republic of Chile. Tim and Jackie separated in the month of March, 2003 at Jackie's insistence citing subsequently unproven accusations of domestic violence. [A.J.A.] lived in La Serena, primarily with his mother, until she took him surreptitiously and without his father's consent to the USA on August 26, 2005.
2. Jackie was granted daily care and control of [A.J.A.] in November 2004 by the Family Court of La Serena. Tim sued in the same court for expanded access to [A.J.A.] and – in a second access decision handed down February 9, 2005 – was granted extended access with possession of [A.J.A.], notably including the entire month of February each year. Tim also has under Chilean law certain residual rights and duties of oversight as to [A.J.A.]'s care and control. In particular, he monitored [A.J.A.]'s academic

progress in his schools, despite efforts by Jackie to prevent such monitoring.

3. Moreover, in June of 2005 when [A.J.A.] suddenly in need of an emergency appendectomy during a period of possession by Tim, Tim took him to the hospital and authorized the necessary surgery – which was successful. Jackie interfered with the recovery process and shut Tim out of it. When he filed suit to protect [A.J.A.], she authorized her attorney to act on her behalf in the case before the Chilean court, through a power of attorney that she signed on August 13, 2005. Meanwhile, the visitation rights case in the Family Court of La Serena was reactivated, and a hearing was set for September 5, 2005.
4. Then, before a hearing could be held in either case, on August 26, 2005, Jackie took [A.J.A.] out of Chile without Tim's knowledge or consent, in violation of a Chilean statute and in violation of a *ne exeat* order that had been entered by the Family Court of La Serena forbidding removal of [A.J.A.] from the territory of the Republic of Chile without the consent of the Court. The removal was also in violation of Chilean law, since she removed a child whose father had and was exercising visitation rights with him under an order dated February 9, 2005, without seeking or obtaining the necessary written consent from his father.
5. Jackie concealed [A.J.A.]'s location from Tim, who had to hire a private investigator in order to find [A.J.A.] by locating Jackie. Suit was

filed in the 274th Judicial District of Hays County, Texas, in order to enforce the provisions of the Chilean order of February 9, 2005, providing for [A.J.A.] to be with Tim (who lives in Chile) during the entire month of February, 2006.

6. The 274th Judicial District Court, after a trial held on February 13, 2006, for reasons which have not been explained or enumerated, denied the request for enforcement but ordered possession in Texas after school until 8 PM every remaining school day in February, overnight possessions from Thursday to Friday, as well as full possession through the weekends and until the opening of school on Monday. Tim and [A.J.A.] carried out all aspects of that order, until Tim's necessary departure on or about February 25, 2006, in order to return to Chile.
7. Tim brings suit for the return of [A.J.A.] to Chile under the provisions of the Hague Convention on the Civil Aspects of International Child Abduction and under the provisions of its implementing legislation, 42 U.S.C. §§ 11601-11610. The removal of [A.J.A.] from Chile to the USA by Jackie was wrongful within the meaning of Article 3 of said Convention, and Tim did not consent to such removal.

IN WITNESS WHEREOF, the undersigned executes this declaration this the 16th day of August, 2006, subject to the penalties of perjury under the laws of the United States of America.

Timothy Mark Cameron Abbott
/s/

Subscribed and sworn to before me on AUG 16 2006
/s/
David R. Caudill
Vice Consul of the United States of America

CAUSE NO. 06-0280

IN THE DISTRICT COURT OF THE 274TH JUDICIAL DISTRICT OF HAYS COUNTY, TEXAS

IN THE MATTER OF THE MARRIAGE OF JACQUELYN VAYE ABBOTT AND TIMOTHY MARK CAMERON ABBOTT,

AND

IN THE INTEREST OF [A.J.A.], A CHILD

ORDER ON RESPONDENT'S SPECIAL APPEARANCE

HEARING ON SPECIAL APPEARANCE

1. The special appearance of Respondent Timothy Mark Cameron Abbott filed in this case came on for hearing before the undersigned Visiting Judge on June 19, 2006. Counsel for both parties were present and announced ready.

FINDINGS

2. After due consideration of the ORIGINAL DIVORCE PETITION and RESPONDENT'S SPECIAL APPEARANCE, as well as the notices of appeal from the ruling of the Associate Judge, RESPONDENT'S BRIEF ON THE SPECIAL APPEARANCE BY TIMOTHY MARK CAMERON ABBOTT, the letter briefs submitted by counsel for each party, the

documents introduced into evidence, and the oral arguments of counsel for both parties, the Court finds as follows:

3. The Court finds that the order by the Honorable Charles Ramsay in Cause No. 06-0146 of this the 274th Judicial District Court, delivered orally and noted on the docket sheet following the hearing held on February 13, 2006, and later incorporated by him into the Order signed by him on March 16, 2006, and filed in said cause on March 27, 2006, and constituted a modification of a foreign judgment; although the Court in that case denied the father's request for visitation in the Republic of Chile, the visitation which he ordered in Texas during a specific period of time in February of 2006 was a result of the litigation, and the father's exercise of this visitation during such time constituted participation in the proceeding.
4. Therefore, since he was physically present in Texas from February 13, 2006, until his departure in order to return to the Republic of Chile on or about February 25, 2006, solely for the purpose of participating in Cause No. 06-0146, the Respondent in this cause, Timothy Mark Cameron Abbott, enjoyed limited immunity from the personal jurisdiction of this Court under the provisions of Texas Family Code § 152.109 during all of the time period mentioned in this paragraph above – and specifically on February 23, 2006.

ORDER

5. The Court, since it has no personal jurisdiction over the Respondent, therefore SUSTAINS the special appearance filed in this cause by the Respondent, Timothy Mark Cameron Abbott, and dismisses Petitioner's suit as to all aspects of this action which require personal jurisdiction over Respondent, ordering that Petitioner take nothing as to such aspects.
6. Nothing herein, however, prevents this Cause No. 06-0280 from proceeding as a case in rem or quasi in rem as to those aspects of this Cause which do not require the existence of personal jurisdiction over the respondent.
7. The offer by Petitioner of the AMENDED RETURN OF SERVICE into evidence is DENIED, due to unfair surprise, but the Court makes no ruling as to the validity of this document or as to its ultimate admissibility or inadmissibility.
8. All previous findings by the Associate Judge which are consistent with the findings in this decision are hereby UPHELD, and all previous findings or holdings by the Associate Judge which are inconsistent with the findings in this decision are hereby REVERSED AND SET ASIDE.

SIGNED this the 18 day of August, 2006.

/s/_____
Jack R. Miller, Visiting District Judge

APPROVED AS TO FORM AND SUBSTANCE:

*/s/*_____
Adair Dyer, Attorney for the Respondent

APPROVED AS TO FORM ONLY:

*/s/*_____
James L. Arth, Attorney for the Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-06-CA-359-LY

TIMOTHY MARK CAMERON ABBOTT,
Plaintiff

v.

JACQUELYN VAYE ABBOTT,
Defendant

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER

Pursuant to Rule 15 of the Federal Rules of Civil Procedure and in accordance with the Scheduling Order signed by the Court on 29 November 2006, Jacquelyn Vaye Abbott, who has been named as the defendant in this case, formally amends her answer to the claims asserted in Timothy Abbott's original complaint that was filed with this Court on 11 May 2006. In specific response to the averments upon which Timothy Abbott relies, Defendant makes the following admissions and denials, and asserts the following specific defenses:

1. Defendant admits the averments in paragraph 1 of Plaintiff's complaint wherein Plaintiff avers that the basis of Plaintiff's complaint is a claim brought under the International Child Abduction Remedies Act (42 U.S.C. §§ 11601-11610) for the return of a child to the Republic of Chile. Defendant

admits that the child the subject of this action, [A.J.A.], was born in Hilo, Hawaii, on XX, 1995. Defendant further admits that at the time of the filing of Plaintiff's complaint, [A.J.A.] was a resident of the city of Dripping Springs, Hays County, Texas. As of the date of the filing of this amended answer, the child now resides in the city of Austin, Travis County, Texas.

2. Defendant admits the averment in paragraph 2 of Plaintiff's complaint in which Plaintiff avers that Defendant removed the child from Chile without Plaintiff's prior knowledge on 26 August 2005. Defendant denies that Defendant was required to notify Plaintiff prior to removing the child from Chile. Defendant further denies that Defendant was required to obtain Plaintiff's consent to remove the child from Chile. Defendant specifically denies that the child's removal from Chile was a breach of "rights of custody" within the meaning of the Hague Convention and under decisions of the courts of Chile or its law. Defendant also specifically denies the existence of any foreign or domestic statute, rule, or regulation prohibiting Defendant from removing the child from Chile and establishing the child's residence in the United States of America. Additionally, Defendant specifically denies the existence of any foreign or domestic court order or decree prohibiting Defendant from removing the child from Chile and establishing the child's residence in the United States of America.

3. Defendant is unable to admit or deny Plaintiff's averment in paragraph 3 of Plaintiff's complaint where Plaintiff avers that he would have continued to exercise his custodial and possessory

rights if the child had remained in Chile. Defendant denies that Plaintiff was fully exercising his "rights of custody" with respect to the child. Finally, as stated previously the child currently resides in Austin, Travis County, Texas, not in Hays County as alleged by Plaintiff.

4. Defendant admits the averments in paragraph 4 of Plaintiff's complaint regarding the Hague Convention.

5. Defendant denies that Plaintiff is entitled to the relief requested in paragraph 5 of Plaintiff's complaint and requests that the Court deny Plaintiff's complaint in its entirety, including Plaintiff's request for fees and costs.

6. Pursuant to Rule 8(c) of the Federal Rules of Civil Procedure, Defendant affirmatively asserts that Plaintiff is precluded from obtaining relief from this Court on the basis of the application of the doctrine of *res judicata*. Specifically, Defendant asserts that on 27 March 2006, in Cause No. 06-0146, styled *In the Interest of [A.J.A.], a Child,* filed in the 274th Judicial District Court of Hays County, Texas, the Honorable Charles Ramsey signed an order entitled *Order on Petition for Temporary Enforcement of Order for Visitation Issued by a Competent Court of the Child's Home State*. In that order, the state district court specifically denied Timothy Abbott's request for an order authorizing Timothy Abbott to take the child who is the subject of this suit to Chile. Defendant specifically alleges that the identical issues presented by Plaintiff in this proceeding have already been considered by the Texas district court and that the Texas court denied Plaintiff's request for relief. Accordingly, Plaintiff should be barred under

the doctrine of *res judicata* from relitigating those same issues in this forum.

7. Pleading further, Defendant also asserts that any foreign order that Plaintiff may be attempting to enforce in this action has been superceded by the subsequent orders of the Texas district court in Cause No. 06-0146, styled *In the Interest of [A.J.A.], a Child,* filed in the 274th Judicial District Court of Hays County, Texas, and by orders that may be entered in Cause No. 06-0280, styled *In the Matter of the Marriage of Jacquelyn Vaye Abbott and Timothy Mark Cameron Abbott and in the Interest of [A.J.A.], a Child*, pending in the 274th Judicial District Court of Hays County, Texas. By virtue of the *Order on Petition for Temporary Enforcement of Order for Visitation Issued by a Competent Court of the Child's Home State* signed by the Court on 27 March 2006, the Texas district court modified the previous orders of the Chilean courts regarding the child who is the subject of this suit. Accordingly, any orders previously rendered by the courts in Chile have been superceded and are of no further force and effect. Also, it is anticipated that the Texas District Court will enter further orders regarding the child in connection with the divorce proceeding currently pending before the state district court. If such orders are entered, it would render the effect of any order of the Chilean court even more meaningless.

8. In light of the foregoing, Defendant prays that Plaintiff take nothing by way of his complaint.

Defendant additionally prays for general relief.

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-06-CA-359-LY

TIMOTHY MARK CAMERON ABBOTT,

Plaintiff

v.

JACQUELYN VAYE ABBOTT,

Defendant

DEFENDANT'S TRIAL BRIEF

In an effort to assist the Court in determining the relevant issues of law related to her defense to the *Original Complaint and Petition for Return of Child Pursuant to the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610, and the Hague Convention on the Civil Aspects of International Child Abduction ("The Hague Convention"), a Multilateral Treaty* filed by Timothy Mark Cameron Abbott ("Plaintiff"), Jacquelyn Vaye Abbott ("Defendant") submits this brief in support of her request that the Court deny the relief sought by Plaintiff.

Applicable Facts

1. In support of his complaint for return of the child who is the subject of this suit, Plaintiff has submitted to this Court a true and correct copy of his

Application for Assistance Under the Hague Convention on International Child Abduction. Among the documents contained in the application are copies of three separate orders entered by the Chilean courts regarding custody and visitation with respect to the parties' child, [A.J.A.].[1]

2. The first order entered by the 3rd Court for Juvenile Matters of La Serena, Chile is dated 30 January 2004 and addresses Plaintiff's visitation rights with his child. Under the express terms of that order, Plaintiff is granted visitation with his son every other weekend from 8:00 p.m. on Friday to 8:00 p.m. on Saturday and on Wednesdays from the time school ends until 8:00 p.m. The 30 January 2004 order clearly reflects that no other relief was granted to Plaintiff by the Chilean court.

3. The second order entered by the Chilean court is dated 22 November 2004 and relates to Plaintiff's request to obtain custody rights regarding his son. In that order, the Chilean court specifically denied Plaintiff's request for custody and expressly ordered that custody of [A.J.A.] reside with his mother, Jacquelyn Vaye Abbott. Accordingly, the 22 November 2004 order of the Chilean court grants no custody rights to Plaintiff.

4. The third order entered by the Chilean court with respect to [A.J.A.] is an order dated 9 February 2005. The only relief granted to Plaintiff in that order is a modification of Plaintiff's visitation rights.

---

[1] A fourth order entitled *Petition for Order de Arraigo*, dated 13 January 2004, is also included; however, that order did not address custody or visitation. Instead, the order was intended to insure that Plaintiff did not illegally removed the parties' child from Chile.

As with the two previous orders entered by the Chilean court, the 9 February 2005 (which is the most recent order from the Chilean court), does not grant Plaintiff any custodial rights to his son.

5. The child, who is the subject of Plaintiff's complaint, was born on XX, 1995 in Hilo, Hawaii. The parties resided in Hawaii until November 1998, when they moved to the Canary Islands in Spain. The parties then moved to Chile in February 2002. At the time the parties moved to Chile, Plaintiff had received a five-year contract to work at Cerro Tololo International Observatory in La Serena, Chile. On or around 13 March 2005, the parties separated.

6. Although Plaintiff was employed with the observatory, Defendant was unable to hold a job due to restrictions imposed on her visa. Further, Defendant was unable to lease an apartment in Chile due to the same restrictions on her visa.

7. On 27 January 2005, the Chilean court found that Plaintiff owed back child support in the amount of approximately $23,794.00 in U.S. dollars. Faced with the fact that she was separated, unable to work, unable to obtain an apartment, and was not receiving support from her husband, on 26 August 2005, Defendant and the child left Chile to return to the United States of America.

Relevant Legal Issues

8. In his brief to this Court, Plaintiff accurately details for this Court the elements that Plaintiff would need to prove in order to be entitled to relief. Defendant also agrees that the central issue that this Court will need to determine at the trial of this case is whether Defendant wrongfully removed [A.J.A.] from Chile. Central to the determination of this issue

will be consideration of whether or not Plaintiff possessed any custodial rights with respect to his son.

9. As previously noted, the only rights that the Chilean court granted to Plaintiff with respect to his son were visitation rights, which do not constitute custodial rights falling within the meaning of the Hague Convention. Under the orders entered by the Chilean court, Defendant had full custodial rights with respect to the parties' son, including the right to determine the child's residence. The only rights that were afforded to Plaintiff were visitation rights, which were, as Plaintiff concedes, are insufficient to satisfy the requirement of rights of custody under the Hague Convention.

10. In addition to the foregoing, Defendant would also assert that Plaintiff's claim is barred by *res judicata*. In determining whether *res judicata* applies in this case, this Court must determine the preclusiveness of the judgment under the principles of Texas law. *Jones v. Sheehan*, 82 F.3d 1334, 1338 (5th Cir. 1996). *Res Judicata* is a general term used to describe a group of related concepts concerning conclusive effects on final judgments. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627 (Tex. 1992). Within the doctrine, there are two categories: (1) claim preclusion (also known as *res judicata*), and (2) issue preclusion (also known as collateral estoppel). *Id.* To establish *res judicata*, the claimant must show: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action. *In re Erlewin*, 349 F.3d 205 (5th Cir. 2003), *citing Amstadt v. U.S.*

Brass Corp., 919 S.W.2d 644, 652 (Tex. 1996) Collateral Estoppel is more narrow than *res judicata* in that it only precludes the re-litigation of identical issues of fact or law that were litigated in a prior suit. *Barr*, 837 S.W.2d at 628.

11. As pled by Defendant in her Answer to this Court, on 31 January 2006, Plaintiff filed in the 274th Judicial District Court of Hays County, Texas, a *Petition for Temporary Enforcement of Order for Visitation Issued by a Competent Court of a Child's Home State and for Temporary Restraining Order and Order to Show Cause/Citation.* Plaintiff amended his petition on 13 February 2006. In his pleadings, Plaintiff alleged that his son had been wrongfully removed from Chile and specifically sought an order from the State District Court granting Plaintiff the right to return the child to Chile. In an order dated 27 March 2006, the State District Court denied Plaintiff's request and entered an order granting Plaintiff's visitation with his son.

12. Under the concept of claim preclusion, Plaintiff should now be prohibited from asking this Court for relief. Plaintiff and Defendant were the only parties to the proceedings in the Texas State District Court. The 27 March 2006 order rendered by the Texas State District Court was a final order rendered by a court of competent jurisdiction. Lastly, the same issue, i.e., the return of the child is the subject of both the state court action pending before this Court. More importantly, it should be recognized that even if the Plaintiff's claim in the state court was not denominated as "a Hague Convention action," the fact that the claim could have been brought in state

court, precludes consideration of the claim in this Court.

13. Further, the order entered by the State District Court on 27 March 2006, constitutes a modification of the original orders entered by the Chilean courts. Accordingly, Defendant asserts that these proceedings have now in essence been "domesticated" and this is no longer an international custody dispute, but rather by his own volition, Plaintiff has chosen his forum and that the question of custody, visitation and other matters related to child is now firmly under the jurisdiction of the Texas courts.

14. In light of the foregoing, Jacquelyn Vaye Abbott respectfully requests that the Court deny the relief requested by Plaintiff in this case.

Respectfully Submitted,

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Certificate of Service

I certify that, on the 14th day of February 2007, I electronically filed the foregoing with the Clerk of the United States District Court for the Western District of Texas, by using the CM/ECF system, who will send notification of such filing electronically to

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PETITIONER'S BRIEF

(7)

No. 08-645

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,

Petitioner,

v.

JACQUELYN VAYE ABBOTT,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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QUESTION PRESENTED

Under the Hague Convention on the Civil Aspects of International Child Abduction, a child who has been "wrongfully removed" from his country of habitual residence must be returned. Hague Convention art. 12. A "wrongful removal" is one that occurs "in breach of rights of custody." *Id.* art. 3. The question presented is:

Whether a ne exeat clause (that is, a clause that prohibits one parent from removing a child from the country without the other parent's consent) confers a "right of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction.

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BRIEF FOR THE PETITIONER

Petitioner Timothy Abbott respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a) is published at 542 F.3d 1081. The district court's opinion (Pet. App. 15a) is published at 495 F. Supp. 2d 635.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2008. Pet. App. 1a. Petitioner filed a timely petition for a writ of certiorari on November 14, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT TREATY AND STATUTORY PROVISIONS

The Hague Convention on the Civil Aspects of International Child Abduction (Pet. App. 27a), the International Child Abduction Remedies Act (Pet. App. 46a), and Minors Law 16,618 art. 49 (Chile) (Pet. App. 61a) are reproduced in the Petition Appendix.

STATEMENT OF THE CASE

1. The United States is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"), Oct. 25, 1980, T.I.A.S. No. 11670, which came into force in the United States on July 1, 1988. Congress implemented the Convention in the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 et seq.

The Convention is the primary source of international law governing the return of children who have been abducted by a parent to another country. It was negotiated and adopted "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." Pet. App. 27a.

Article 12 of the Convention requires signatory countries to return any children who are wrongfully removed from, or retained outside of, their country of habitual residence. Pet. App. 32a. Article 3 of the Convention outlines two requirements that must be met for a removal or retention to be considered wrongful. First, the removal or retention must occur "in breach of rights of custody . . . under the law of the State in which the child was habitually resident immediately before the removal or retention." Pet. App. 28a. Second, "at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." *Id.* Under Article 3, rights of custody may arise "by operation of law or by reason of a judicial or administrative decision, or by

reason of an agreement having legal effect under the law of that State." *Id.*

In turn, Article 5(a) of the Convention defines "rights of custody" as including "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Pet. App. 28a. The term "rights of custody" is to be construed "autonomously" – that is, not by looking at how the particular country at issue has described the right, but rather by determining whether the substance of a parent's rights under the law of the country of the child's habitual residence amounts to "rights of custody" under the Convention. Perm. Bureau of the Hague Conf. on Priv. Int'l Law, *Overall Conclusions of the Special Commission of Oct. 1989 on the Operation of the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction* 3 (1989).[1]

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[1] The Convention carves out four narrow exceptions to the automatic return remedy. Three of those exceptions can be found in Article 13, which provides that the child's return is not required if (1) the custody holder either "was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention"; (2) "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation"; or (3) the authorities in the country to which the child was abducted determine "that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." Pet. App. 33a. The fourth exception is found in Article 20, which authorizes a signatory state to decline return when it "would not be permitted by the fundamental principles of the requested State

In contrast with the automatic return remedy for breaches of "custody" rights, the Convention does not require the return of a child whose removal or retention breaches rights of "access," which the Convention defines in Article 5(b) as including "the right to take a child for a limited period of time to a place other than the child's habitual residence." Pet. App. 28a. Instead, a parent holding access rights may seek assistance in "securing the effective exercise" of those rights. *See* Pet. App. 35a.[2]

The Convention reflects the judgment that the best interests of children collectively are served by returning wrongfully removed children to the country of their habitual residence. PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 29-30 (1999); *see also* Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ("Pérez-Vera Report"), *in* ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 431, ¶ 23 (1982).[3]

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relating to the protection of human rights and fundamental freedoms." Pet. App. 35a.

[2] Each Convention signatory must designate one or more Central Authorities "to discharge the duties which are imposed by the Convention." Pet. App. 29a. The Central Authorities are responsible for "co-operat[ing] with each other and promot[ing] co-operation . . . to secure the prompt return of children and to achieve the other objects of this Convention." *Id.*

[3] The Pérez-Vera Report is recognized "as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention." U.S. Dep't of State, *Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10,494, 10,503 (Mar. 26, 1986).

Thus, in the view of the Convention's signatories, a court faced with a Convention claim should generally refrain from determining whether the best interests of a particular child will be served by his return. *See* BEAUMONT & MCELEAVY, *supra*, at 29 & n.8.

In particular, the Convention was intended to be a "reciprocal" convention, pursuant to which signatories mutually agree to return abducted children so that the courts in the child's country of habitual residence can resolve any disputes regarding custody. "[T]his duty of co-operation . . . makes the Convention an effective instrument to stop the cycle of kidnappings and re-kidnappings" that often prevailed in the absence of an international remedy. Perm. Bureau Germ. Const'l Ct. Memo., 35 I.L.M. 529, 538, ¶ 9 (1996).

2. Petitioner Timothy Abbott, a British citizen, married respondent Jacquelyn Vaye Abbott, a U.S. citizen, in England in 1992. Pet. App. 1a. Mr. Abbott's work as an astronomer specializing in detector science and telescope management took the couple to Hawaii, where their son A.J.A. – who is a citizen of both the United States and the United Kingdom – was born in 1995. *Id.* After a three-year stay in the Canary Islands, the Abbotts moved to Chile, where Mr. Abbott had accepted a new job. *Id.*

In March 2003, Mr. and Mrs. Abbott separated. Pet. App. 1a. During the next two-and-a-half years, they litigated various issues relating to their son in a Chilean family court, ultimately leading to a series of orders by that court. This included a ne exeat order, issued on January 13, 2004 at Mrs. Abbott's request, which prohibited either parent from removing A.J.A. from Chile without the court's written authorization.

Pet. App. 2a. Pursuant to the other orders, Mrs. Abbott retained daily care and control of A.J.A., but Mr. Abbott had a "direct and regular" relationship with his son, Pet. App. 16a-17a, that by February 2005 included visitation every other weekend, one evening per week, and for one month during A.J.A.'s summer vacation, J.A. 40.

In addition to the January 13, 2004 ne exeat order entered by the Chilean family court, Mr. Abbott also held a ne exeat right under a Chilean statute that requires written authorization from a parent having visitation rights before the other parent may take a child out of Chile. Minor's Law 16,618 art. 49 (Chile) (Pet. App. 61a). If the parent having visitation rights either cannot authorize the child's departure from the country or denies authorization "without good reason," the Chilean family court may give permission for the child to leave the country. Pet. App. 62a.

In July 2005, as disputes over the care and control of A.J.A. continued, Mr. Abbott returned to the Chilean family court seeking a protective order that would have expanded his rights with respect to his son. *See* Pl.'s Dist. Ct. Tr. Br. ¶ 20, *reprinted in* C.A. R. 48; J.A. 56; *see also* Pet. App. 2a. The visitation-rights case in the family court was also re-opened, and a hearing was scheduled for September 5, 2005. *See* J.A. 56.

On August 26, 2005, while proceedings in the Chilean family courts were still pending, Mrs. Abbott boarded a flight in Santiago, Chile, taking with her A.J.A. – who was then ten years old. Pet. App. 17a. Without Mr. Abbott's knowledge or consent, and in violation of both the Chilean ne exeat order and

Chilean law, Mrs. Abbott took A.J.A. to the United States, *id.*, where they remain today. According to the police report, Mrs. Abbott presented airport officials in Santiago with a copy of the family court's November 2004 decision, which awarded daily care and control of A.J.A. to her and indicated only that Mr. Abbott's visitation rights had been "already determined" in an earlier proceeding. Report of Int'l Police of Santiago Airport, Order No. 1257-1 (Oct. 17, 2005) (English trans.), *reprinted in* Plaintiff's Dist. Ct. Ex. 1, C.A. R. Excerpts, Tab 37, at 11-12. Mrs. Abbott also provided officials with a copy of a provisional settlement regarding visitation, entered in August 2003, that applied only for eight weeks. *Id.* She failed to provide copies of either the January 2004 or February 2005 orders granting Mr. Abbott a "direct and regular" relationship with his son, including visitation. And although Chilean immigration officials had entered the ne exeat order in their database in January 2004, a data entry error prevented airport officials from discovering the ne exeat order when they conducted a search of the database. *Id.*

Petitioner hired a private investigator and, four months after the removal, located his son in Texas. Pet. App. 2a. In February 2006, Mrs. Abbott filed a petition for divorce in Texas state court. J.A. 44-51. In addition to a divorce from Mr. Abbott, Mrs. Abbott asked the court to issue a new custody order that would modify the terms of the orders issued by the Chilean family court to expand her own rights with regard to A.J.A., while diminishing those of Mr. Abbott. J.A. 46-49. She sought, among other things, to be appointed as A.J.A.'s "sole managing

conservator" under Texas law, J.A. 46, an appointment that would give her the exclusive right to designate A.J.A.'s primary residence, to consent to certain medical and psychiatric treatments for him, and to make decisions concerning his education, Tex. Fam. Code § 153.132.[4] She also sought an order requiring that any visitation by Mr. Abbott with his son occur in Texas and under supervision, as well as a declaration that the United States was A.J.A.'s country of habitual residence. J.A. 48. The case remains pending in the state district court, which has issued only one order in the proceeding, upholding Mr. Abbott's special appearance pursuant to Texas Rule of Civil Procedure 120a. *See* J.A. 59-61.

2. In May 2006, petitioner filed this suit in federal district court in Texas, seeking to have his son returned to Chile pursuant to the Convention and ICARA on the ground that the ne exeat right conferred by Chilean law and the January 13, 2004 court order constituted "rights of custody" for purposes of the Convention. J.A. 53. In her answer, Mrs. Abbott countered that her removal of A.J.A. from Chile without Mr. Abbott's consent did not breach any "rights of custody" for purposes of the Convention. J.A. 64. And in any event, she posited, the Chilean court orders could be "render[ed] . . . meaningless" by any orders entered regarding A.J.A. in the divorce proceedings that she had initiated. J.A. 66.

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[4] Under Texas law, it is generally presumed to be in the best interest of the child to have both parents appointed as joint managing conservators. Tex. Fam. Code § 153.131.

The district court denied Mr. Abbott's request for his son's return. Pet. App. 15a. Although Mrs. Abbott had specifically conceded that her removal of A.J.A. violated Chilean law (and in particular the ne exeat order), Pet. App. 6a, 19a-20a, and the court acknowledged that her removal of A.J.A. without Mr. Abbott's consent or knowledge "violated and frustrated the Chilean court's order," Pet. App. 24a, the court nonetheless concluded that the removal was not "wrongful" within the meaning of the Convention because Mr. Abbott's ne exeat right was not a right of custody. Pet. App. 26a.[5]

On appeal, the Fifth Circuit affirmed. Framing the "dispositive question" before it as whether Mr. Abbott "possessed 'rights of custody' as defined by the Hague Convention," Pet. App. 5a, the court of appeals declined to follow the Eleventh Circuit's decision in *Furnes v. Reeves*, 362 F.3d 702 (11th Cir.), *cert. denied*, 543 U.S. 978 (2004), holding that "a ne exeat right alone is sufficient to constitute a custody right," Pet. App. 10a (footnote omitted), or the dissent in *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001), which also deemed the ne exeat right at issue in that case a "right of custody." Instead, the Fifth Circuit reasoned, "[t]he

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[5] In light of its holding, the district court declined to consider whether Mr. Abbott's Convention suit was barred by res judicata by virtue of his earlier state court suit seeking temporary enforcement of the Chilean visitation order. *See* Pet. App. 17a, 25a. Similarly, the Fifth Circuit did not address this issue on appeal.

ne exeat order . . . gave [Mr. Abbott] a veto right over his son's departure from Chile, but it did not give him any rights to determine where in Chile his son would live." Pet. App. 13a. Moreover, "the Chilean family court, in its second order, expressly denied the father's request for custody rights and awarded all custody rights to the mother." *Id.* Thus, the panel held, "ne exeat rights, even when coupled with 'rights of access,' do not constitute 'rights of custody' within the meaning of the Hague Convention." Pet. App. 14a.

Mr. Abbott filed a timely petition for certiorari. On May 28, 2009, pursuant to this Court's invitation, the Solicitor General filed a brief expressing the United States' view that the decision below was erroneous because the ne exeat right was a right of custody, and that the petition should be granted. On June 29, 2009, the Court granted certiorari. 129 S. Ct. 2859 (2009).

SUMMARY OF THE ARGUMENT

The question before this Court is easily resolved by the plain language of the Convention: a ne exeat right is a "right of custody" because it gives the parent holding the right decision-making authority over the country in which the child will live and thus constitutes a "right to determine the child's place of residence." This is so even under a narrow construction of the term "place of residence" that focuses on the specific address or city in which the child lives, because the parent holding the ne exeat right enjoys the joint right to make such determinations whenever the other parent seeks to live outside the child's country of habitual residence –

i.e., in precisely the circumstances with which the Convention is concerned.

Holding that a ne exeat right is a right of custody is also most consistent with the context and purpose of the Convention. The Convention's signatories adopted an automatic return remedy to ensure that courts in the country of the child's habitual residence should decide questions relating to the merits of custody disputes. This case is a perfect example of this principle. Under the Chilean court orders and Chilean law, Mr. Abbott had the right to a direct and regular relationship with his son and the shared right to determine the country in which his son would live; Mrs. Abbott had day-to-day care and control of A.J.A. but, by virtue of Mr. Abbott's ne exeat right, was limited to exercising those rights in Chile absent Mr. Abbott's authorization to leave the country. When Mrs. Abbott absconded to the United States with A.J.A., in acknowledged violation of both the ne exeat order and Chilean law, she not only prevented the Chilean family court from resolving the pending proceedings before it – in which Mr. Abbott sought to expand his rights with regard to A.J.A. – but then also went to court in Texas seeking to further expand her own rights, at Mr. Abbott's expense. Construing the ne exeat right as a right of custody, thereby requiring A.J.A.'s return to Chile, will ensure that the Chilean family courts can resolve the pending disputes and any others that may arise.

Because the text and purpose of the Convention make clear that a ne exeat right is a right of custody, no further inquiry is necessary. But even if the text were ambiguous, the post-ratification understanding of the Convention's signatories confirms that a ne

exeat right is a right of custody. First, two Special Commissions – meetings convened to review the operation and implementation of the Convention – have specifically addressed the issue, with both concluding that the right is a right of custody. Second, the overwhelming weight of authority in our sister signatories agrees that the ne exeat right is a right of custody. By contrast, not a single other signatory can be characterized as having squarely taken the position adopted by the Fifth Circuit in this case.

ARGUMENT

I. The Plain Language And Context Of The Convention Demonstrate That A Ne Exeat Right Is A Right Of Custody

In interpreting a treaty, this Court has made clear that courts should "begin with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (quotation marks omitted); *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999). This approach to treaty interpretation is consistent with the Vienna Convention on the Law of Treaties, which establishes a "[g]eneral rule of interpretation" for treaties.[6] First, it instructs that "[a] treaty shall

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[6] Although the United States has not ratified the Vienna Convention on the Law of Treaties, the Department of State has indicated both that "the Convention is already generally recognized as the authoritative guide to current treaty law and practice," Dep't of State, Letter of Submittal to the President, S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971), and that "[m]ost

be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, Art. 31, 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1969). In determining the meaning of the treaty's terms, "[a] special meaning shall be given to a term if it is established that the parties so intended." *Id.* The plain text of the Convention establishes that petitioner's ne exeat right constitutes a "right of custody."

A. The Text Of The Convention Confirms That A Ne Exeat Right Is A Right Of Custody

The question presented by this case is simple, and the inquiry can begin and end with the text: because a ne exeat right gives decision-making authority over the country in which the child lives to the parent holding the right, it constitutes a right to determine the child's place of residence and is thus a "right of custody" for purposes of the Convention.

Article 3 of the Convention provides that "[t]he removal or the retention of a child is to be considered wrongful," thereby triggering the automatic return remedy, when the removal or retention occurs "in breach of rights of custody attributed to a person . . . either jointly or alone." Pet. App. 28a. Article 5 expressly states that "rights of custody" "*include*

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provisions of the Vienna Convention, including Articles 31 and 32 . . . are declaratory of customary international law," Letter from Roberts B. Owen, Legal Advisor of the Dep't of State, to Sen. Adlai Stevenson III (Sept. 12, 1980).

rights relating to the care of the person of the child and, *in particular*, the right to determine the child's place of residence." *Id.* (emphases added). Thus, even though the Convention does not provide a comprehensive definition of these rights, the text singles out decision-making authority over the child's place of residence as a paradigmatic example of rights of custody.

To be sure, the Convention does not expressly define the scope of the phrase "place of residence," but – critically – the Convention is concerned with attempts to remove children to other countries, not with how parental rights operate within the borders of a single country. Thus, it was "designed to provide a remedy not for whether" a child may live in one place or another within a country, "but for whether [the parent] should be able to take [the child] across international borders." *See Furnes v. Reeves*, 362 F.3d 702, 715 (11th Cir.), *cert. denied*, 543 U.S. 978 (2004); *see also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) ("The frame of reference in interpreting treaties is naturally international, and not domestic."). Moreover, holding that the ne exeat right confers a right to determine the child's place of residence, and is therefore a right of custody, is consistent with this Court's admonition that "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *Stuart v. United States*, 489 U.S. 353, 366 (1989).

Even if the term "place of residence" is construed more narrowly – as a specific address or city, rather

than as a country – the parent holding the ne exeat right still has the power to determine the specific place where the child will live whenever the other parent seeks to live outside the child's country of habitual residence. This is because the parent holding a ne exeat right "enjoys the power not only to deny consent to [the child's] moving abroad, but also the power to *grant* consent subject to whatever *conditions* he chooses" – including the city or even the specific place outside of the country in which the child will live. *Furnes*, 362 F.3d at 715. Thus, even if the parent holding the ne exeat right does not share the right to determine precisely where the child will live within the country of habitual residence, he nonetheless has a joint right to determine at least in part the child's place of residence. For example, if Mrs. Abbott had – as required by Chilean law – sought Mr. Abbott's authorization to take A.J.A. out of Chile rather than absconding with the child, Mr. Abbott would have the right to determine either that A.J.A. would remain in Chile or where outside of Chile he would live. That the right is a partial one does not make it any less of a right under the Convention: "[j]ust as there is no requirement in the Convention that a custody right be exercised exclusively by the parent seeking return, there is no requirement that the right be exercised predominantly by that parent." *Id.* at 716.

In addition to constituting a right to determine the child's place of residence, the ne exeat right also effectively confers the right to play a role in making other important decisions about the child, thereby constituting a right "relating to the care of the person of the child" – part of the definition of "rights of

custody" given in Article 5(a) and applicable to Article 3. For example, by requiring that a child remain in the country of habitual residence, a parent holding a ne exeat right can exercise significant influence over the child's language, education, nationality, and cultural identity. *See Furnes*, 362 F.3d at 716 ("By requiring that Jessica remain in Norway, Furnes can ensure that Jessica will speak Norwegian, participate in Norwegian culture, enroll in the Norwegian school system, and have Norwegian friends. That is, Plaintiff Furnes effectively can decide that Jessica will *be Norwegian*. The right to determine a child's language, nationality, and cultural identity is plainly a right 'relating to the care of the person of the child' within the meaning of the Convention.").[7] A parent holding a ne exeat right can similarly exercise influence over the child's upbringing by consenting to the child's relocation overseas but imposing conditions on the move. Such conditions are not necessarily limited to where outside the country of habitual residence the child lives, but instead also may bear on the child's cultural identity, the schools attended, the languages spoken by the child, and the child's access to specialized medical care.

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[7] *See also Lieberman v. Tabachnik*, No. 07-cv-02415-WYD, 2008 WL 1744353, at *11 (D. Colo. Apr. 10, 2008) ("Petitioner['s] ne exeat right provides him with additional decision making authority over the children's care. By requiring the children remain in Mexico, Petitioner can ensure that the children participate in Mexican and Jewish culture, that they are enrolled in Mexican and/or Jewish schools, and that they have Mexican [and/or] Jewish friends.").

Holding that a ne exeat right is a right of custody is also most consistent with the Convention's open-ended definition of "rights of custody." The Convention indicates that "rights of custody" "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." This was a deliberate choice, intended to protect "*all* the ways in which custody of children can be exercised" through "a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration." Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, *in* ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 446 (1980) (emphasis in original).

By contrast, the Fifth Circuit's cramped construction of the phrase "rights of custody" rests on a definition of "custody" gleaned solely from U.S. dictionaries – an approach that cannot be reconciled with the drafters' decision to promulgate "an autonomous concept" that is "not necessarily coterminous with rights referred to as 'custody rights' created by the law of any particular country or jurisdiction," Perm. Bureau of the Hague Conf. on Priv. Int'l Law, *Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention* 3, ¶ 9 (1989), rather than favoring any one signatory's conception of custody rights, Linda Silberman, *Interpreting the Hague Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1068-70 (2005).

2. The textual arguments to the contrary – advanced in cases such as *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001), and

by the Fifth Circuit in this case to support the contention that a ne exeat right cannot be a right of custody – are unavailing.

a. First, in *Croll*, the majority concluded that a ne exeat right is not a right of custody because it does not confer a right to determine the child's place of residence but is instead simply a right to veto the other parent's plan to relocate the child overseas. 229 F.3d at 139; *see also* Pet. App. 13a. However, because (as noted above) the Convention defines "rights of custody" as specifically including "the right to determine the child's place of residence," a parent holding a ne exeat right has, at a minimum, a shared right relating to the determination of the child's place of residence. Pet. App. 28a (art. 3) (providing that rights of custody may be exercised "either jointly or alone"); *see also Furnes*, 362 F.3d at 720 (recognizing that each parent possesses such a right). And even if it were nothing more than a veto or negative right, that "does not diminish its status as a right." *See Croll*, 229 F.3d at 148 n.3 (Sotomayor, J., dissenting).

b. Nor is there any merit to the argument – made by the majority in *Croll*, *see* 229 F.3d at 140 – that a ne exeat right cannot be a right of custody because it cannot be "exercised." First, Article 3 involves two separate inquiries: (1) whether the removal occurred in breach of "rights of custody"; and (2) whether the rights of custody were actually exercised or would have been exercised but for the breach. Thus, courts should only reach the question whether someone was actually exercising rights of custody if they find that there was indeed a custody right. *See, e.g.*, *Lieberman*, 2008 WL 1744353, at *13 (turning to question whether father had exercised his

rights only after determining that father's ne exeat right was right of custody).

Second, courts confronting cases with similar facts have presumed that a left-behind parent such as Mr. Abbott would have exercised his right to object to the child's removal if given the opportunity, such that Article 3(b) is easily satisfied. *See, e.g.*, *Furnes*, 362 F.3d at 720. Such an presumption follows from the plain text of Article 3(b), which provides not only that a removal is considered wrongful as long as rights of custody "were actually exercised," but also makes clear that it is similarly wrongful if the right of custody "would have been so exercised but for the removal or retention."[8]

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[8] In any event, a parent such as Mr. Abbott can easily meet the burden imposed by Article 3(b), which was intended as a "safety mechanism," PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 83 (1999), to ensure that a parent who "ha[d] not played any meaningful role in the pre-removal or retention life of the child" cannot rely on the Convention's summary return mechanism, *id.* at 86. Courts have interpreted Article 3(b) to require only a minimal showing by the left-behind parent: "[A] person who has valid custody rights to a child under the law of the country of the child's habitual residence . . . cannot fail to 'exercise' those custody rights . . . short of acts that constitute clear and unequivocal abandonment of the child." *Bader v. Kramer*, 484 F.3d 666, 671 (4th Cir. 2007).

This test is easily met here: Mr. Abbott filed suit under the Hague Convention seeking A.J.A.'s return; moreover, at the time of Mrs. Abbott's departure from the country, he had filed a suit in the Chilean family court seeking to expand his rights. A contrary approach – that is, one which required the court in the country to which the child was removed to assess the "adequacy of one parent's exercise of custody rights" – would, as the Sixth

Finally, the argument that a ne exeat right cannot be a right of custody because it cannot be exercised is erroneous because it also assumes that this is an all-or-nothing proposition – that is, that a ne exeat right cannot be a right of custody because it cannot be exercised when the child is removed from the country without the left-behind parent's permission. *See, e.g.*, *Croll*, 229 F.3d at 140. But such an assumption is based on the premise that the abducting parent will seek to remove the child, in violation of a court order and/or a statute, without seeking the left-behind parent's permission. However, there are many other ways to exercise the right. For example, an abducting parent may leave the country after having unsuccessfully sought permission from the left-behind parent. Or the left-behind parent may consent to the child's departure subject to conditions (*i.e.*, allowing the child to leave with the other parent for a brief vacation), but the abducting parent will then decide to stay overseas permanently.[9]

c. The argument that the Convention refers to a "bundle" of rights relating to custody, such that

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Circuit has explained, come "dangerously close to forbidden territory: the merits of the custody dispute." *Friedrich v. Friedrich*, 78 F.3d 1060, 1065 (6th Cir. 1996).

[9] *See, e.g.*, *Pasten v. Velasquez*, 462 F. Supp. 2d 1206, 1211 (M.D. Ala. 2006) (left-behind parent objected to removal; court allowed child to go abroad temporarily for mother's studies, but neither mother nor child returned); *Garcia v. Angarita*, 440 F. Supp. 2d 1364 (S.D. Fla. 2008) (left-behind parent consented to travel to U.S. for brief visit with relatives but did not consent to move to Miami).

having just one right – a ne exeat right – cannot trigger the automatic return is also unavailing. *See, e.g.*, *Croll*, 229 F.3d at 139. Nothing in either the Convention or its drafting history indicates that "rights of custody" cannot be separated out into different rights, or that the automatic return remedy could not be invoked by the holder of a single right of custody. To the contrary, the text of the Convention expressly contemplates that some rights will be held jointly. *See* Pet. App. 28a (art. 3(a)). Here, although Mrs. Abbott had day-to-day care and control of A.J.A., she and Mr. Abbott shared the right to determine the child's place of residence.

Moreover, the Pérez-Vera Report explicitly indicates that a parent can seek a child's return even if he possesses only a subset of the "bundle" of custody rights.[10] In a discussion of the term "care

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[10] Mr. Abbott's understanding that the Convention's return remedy may be invoked by a parent who possesses even one "right of custody" – such as a ne exeat right – is shared by the member states of the European Union. In 2003, the Council of the European Union enacted a regulation which confirms that the right to determine the child's place of residence, standing alone, establishes joint rights of custody. Like the Convention, Council Regulation (EC) No. 2201/2003 of 27 November 2003, which was intended to "complement[]" the Convention, *see* ¶ 17, defines "rights of custody" as including "in particular the right to determine the child's place of residence," *id.* art. 2.9; it then goes on to specify that "[c]ustody shall be considered to be exercised jointly when . . . one holder of parental responsibility" – which is in turn defined to include parents holding access rights, *id.* art. 2.7 – "cannot decide on the child's place of residence without the consent of another holder of parental responsibility," *id.* art. 2.11(b).

and control of the child," the Report explained that "[t]he Convention seeks to be more precise by emphasizing, as an example of the 'care' referred to, the right to determine the child's place of residence." Acknowledging that in some signatory states a child, "although still a minor at law, has the right itself to determine its own place of residence," the Report emphasizes that in such cases "the substance of the custody rights will have to be determined in the context of other rights concerning the person of the child." Pérez-Vera Report, *supra*, at 452, ¶ 84.[11]

Finally, even if the Convention did require the parent seeking a child's return to hold a "bundle" of custody rights, rather than just one right of custody, a parent holding a ne exeat right would nonetheless be able to compel the child's return because a ne exeat right in fact confers a multitude of rights. These rights are not limited to the right to prevent his child from being removed from the country without his authorization, but also include the right to authorize the child's departure from the country, subject to whatever conditions he regards as appropriate, and the right to influence the child's education and cultural identity. *See supra* at 16-17.

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[11] *See also* Commonwealth Secretariat, The Hague Convention on the Civil Aspects of International Child Abduction: Explanatory Documentation Prepared For Commonwealth Jurisdictions 16 (1981) (noting that there "is nothing to suggest that such rights [of custody] cannot be separated" and adding that "if the right to day to day care is vested in A and the right to determine the child's place of residence in A and B, both A and B have rights of custody under the Convention").

B. The Context And Purpose Of The Convention Also Demonstrate That The Ne Exeat Right Is A Right Of Custody

1. That a ne exeat right is a right of custody is also demonstrated by the broader context of the Convention and its purposes. The "implicit[]" foundation of the Convention is "the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal." Pérez-Vera Report, *supra*, ¶ 19, *reprinted at* Pet. App. 65a.

Construing a ne exeat right as a right of custody, the breach of which requires the child's return, secures these goals in two ways. First, it deters individuals from taking children across international borders in search of a friendlier forum, by depriving that action "of any practical or juridical consequences." Pérez-Vera Report, *supra*, at 429.[12] Second, it guarantees that custody arrangements ordered by the courts in one member state are respected by the courts in others by "re-establish[ing] a situation unilaterally and forcibly altered by the abductor." *Id.* at 430. Moreover, the Convention's interests in deterrence and reciprocal respect for custody arrangements apply just as fully to a ne exeat right as to a physical custody right. A ne exeat order signals – no less clearly than an explicit joint

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[12] *See also Croll*, 229 F.3d at 147 (Sotomayor, J., dissenting) (citing *Blondin v. Dubois*, 189 F.3d 240, 245-46 (2d Cir. 1999)).

custody order – a court's determination that a child should not be taken from the country absent each parent's consent.

Relatedly, construing a ne exeat right as a right of custody is most consistent with the principle that the courts in the country of habitual residence should decide questions relating to the merits of custody disputes. Specifically, by allowing the parent holding a ne exeat right to ensure both that the child will remain in the country of habitual residence unless he consents to the child's departure and that the child will be returned to the country of habitual residence if he is removed in violation of that right, the parent can ensure that custody disputes will be resolved by the courts in the country of habitual residence, rather than the courts in any country chosen by the abducting parent. Thus, construing a ne exeat right as a "right of custody" under the Convention "is the only means of ensuring fairness to all the parties involved," BEAUMONT & MCELEAVY, *supra*, at 87, because "this is the only means of ensuring that the rights of all those concerned are given due consideration in a forum with which all should be familiar," *id.* at 80.

This case illustrates these principles perfectly. Under the orders entered by the Chilean family court, Mr. Abbott had a "direct and regular" relationship with his son, including extensive visitation, and was seeking to expand his rights with respect to his son; Mrs. Abbott abducted A.J.A. from Chile just a few days before a hearing scheduled in one of those proceedings. *See* J.A. 56. In so doing, she not only prevented the Chilean courts from resolving the pending dispute, but she subsequently

filed her own suit in Texas state court, seeking to modify the orders issued by the Chilean courts to expand her own rights, *see* J.A. 46-49. Construing the ne exeat right as a right of custody, thereby requiring A.J.A.'s return to Chile, will ensure that the Chilean family court – which is the most familiar with the family's situation, having had various disputes before it for several years before A.J.A.'s abduction – can resolve this and any subsequent disputes that may arise.

2. By contrast, holding that a ne exeat right does not trigger the Convention's automatic return remedy would defeat the purposes of the Convention. First, such a holding would undercut the Convention's deterrent effect by enabling the abductor to "unilaterally and forcibly alter[]" unsatisfactory custody arrangements. Indeed, because virtually all Hague Convention signatories to consider the question treat ne exeat orders as conferring a "right of custody" and will order the child's return when such an order is violated, *see infra* at 32-38, under the Fifth Circuit's approach would-be abductors have a strong incentive to seek haven in the United States. Second, as then-Judge Sotomayor explained in her dissent in *Croll*, *see* 229 F.3d at 147, by failing to accord any respect to the foreign court's expressly stated interest in preserving jurisdiction, the Fifth Circuit's approach effectively nullifies the initial custody determination. Third, the Fifth Circuit's approach undermines the reciprocity on which the Convention is based, raising the prospect that other countries will follow the U.S. and decline to order the return of children originally living in the U.S. whose

U.S.-resident parents' rights have been decided by our courts.

Moreover, given the extent to which both ne exeat rights, *see* Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT'L L. & POL. 221, 246 (2000), and international travel have become commonplace, the detrimental effects of such a holding will be widespread. If this Court were to affirm the Fifth Circuit's restrictive approach, it would create a gaping hole in the operation of a Convention that was negotiated and adopted precisely to ensure that custody disputes are resolved by courts in the child's country of habitual residence.

3. In her brief in opposition, Mrs. Abbott contended that construing a ne exeat right as a right of custody would be inconsistent with the purpose of the Convention because it might somehow alter the custodial relationship (and thus, the status quo), BIO 30, by requiring the child's return even if the abducting parent, who may have been responsible for the child's daily care and control, has no obligation to return and the left-behind parent has no obligation to care for the child upon his or her return. *See also Croll*, 229 F.3d at 141.

This argument rests on a misunderstanding of the purpose of the Convention. As the Pérez-Vera Report (at 429, ¶ 16) makes clear, to deter abductions, "the Convention . . . places at the head of its objectives the restoration of the *status quo*," which it seeks to accomplish "by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'." Thus, the restoration of the "*status quo*" envisioned by the Convention

involves the child's return to the country of habitual residence, which can then make a final decision regarding custody, *id.* – a decision that may or may not alter the existing custodial relationship.

In this case, ordering A.J.A.'s return to Chile is independent of whether Mrs. Abbott should ultimately enjoy daily care and control of A.J.A., as she has not previously alleged that she would be unable to accompany A.J.A. back to Chile pending the resolution of the custody disputes there. *Accord Furnes*, 362 F.3d at 717. Nor would A.J.A.'s return in fact alter the custodial relationship that existed prior to her abduction of A.J.A. from Chile: absent Mr. Abbott's authorization to take A.J.A. out of Chile, Mrs. Abbott's own rights of custody could be exercised only in Chile. Relatedly, Mrs. Abbott has also not previously suggested that she would not receive a fair resolution of the pending custody disputes in the Chilean family court. Moreover, no evidence of either grave risk to the child or an intolerable situation – which, if found, could give the court the discretion to decline to order the child's return pursuant to Article 13(b) of the Convention – has been introduced into evidence in this case.

Finally, an argument against the child's return that rests on the abducting parent's absence from the country of habitual residence also seems strange at best: the drafters of the Convention surely did not envision that a parent would be able to take her child out of the country without the left-behind parent's permission and then rely on her own absence as a reason not to return the child.

II. Other Rules Of Interpretation Also Demonstrate That A Ne Exeat Right Is A Right Of Custody

When the text of a treaty is "difficult or ambiguous," "[o]ther general rules of construction may be brought to bear." *Volkswagen Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988) (emphasis omitted). In particular, because treaties should be "construed more liberally than private agreements," *Air France v. Saks*, 470 U.S. 392, 396-97 (1985), a court may "traditionally consider[] as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties." *El Al Israel Airlines v. Tseng, Ltd.*, 525 U.S. 155, 167 (1999) (emphasis in original) (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)).[13]

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[13] Here too this approach is consistent with the Vienna Convention. Article 31.3 of the Convention instructs courts to consider "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation," while Article 32 outlines the "[s]upplementary means of interpretation" on which courts may rely "to confirm the meaning resulting from the application of article 31[] or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure" or, alternatively, "leads to a result which is manifestly absurd or unreasonable." In particular, Article 32 indicates, courts may consult "the preparatory work of the treaty and the circumstances of its conclusion."

In this case, even if the text of the Convention were ambiguous as to the status of ne exeat rights – which is the most that Mrs. Abbott can possibly argue – the history of the Convention and the post-ratification understanding of the Convention's signatories confirm that a ne exeat right is a right of custody.

A. The Subsequent Understanding Of The Convention Signatories

Both post-ratification Special Commission meetings and the decisions of foreign courts reflect the understanding of Convention signatories that a ne exeat right is a right of custody for purposes of the Convention.

1. Meetings Of The Special Commissions Confirm That A Ne Exeat Right Is A Right Of Custody.

Because there is no supranational tribunal "to provide uniform interpretation of the Child Abduction Convention, the Special Commissions are a valuable resource in developing 'best practices' and interpretations of the Child Abduction Convention." Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT'L L. & POL. 221, 228-29 n.28 (2000). Since the Convention entered into force in 1983, two Special Commission reports have specifically addressed the ne exeat issue, with both confirming that a ne exeat right is a right of custody.

The 1989 Special Commission Meeting. The first Special Commission meeting convened to review the implementation and operation of the Convention

was held in 1989. *See* Perm. Bureau of the Hague Conf. on Priv. Int'l Law, *Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (1989). At that meeting, the delegates specifically discussed the meaning of the term "rights of custody." The report that followed the meeting emphasized that "'rights of custody' as referred to in the Convention . . . constitute an autonomous concept, and thus such rights are not necessarily co-terminous with rights referred to as 'custody rights' created by the law of any particular country or jurisdiction thereof." *Id.* ¶ 9. Moreover, the report noted, "it is necessary to look to the content of the rights and not merely to their name" to determine whether a parent held "rights of custody" for purposes of the Convention. *Id.*

To illustrate this point, the report cited an example involving a ne exeat right, making clear that the Special Commission regarded the right as a right of custody. Thus, the report explained,

> in Australia it is customary for "custody" to be granted to one parent, but even in such case Australian law leaves "guardianship" of the child in the hands of both parents jointly; the parent who has not been awarded "custody" under this legal system nonetheless has the right to be consulted and to give or refuse consent before the child is permanently removed from Australia. . . . [I]t was hoped that the inclusion of this description might serve to sensitize the

> Central Authorities in other countries to the fact that the award of what is called "custody" to only one parent under domestic law, does not necessarily mean that all rights of custody within the intent of the Hague Convention have been granted to that parent.

Id.

The report then reiterated that a ne exeat right is a right of custody by providing an example of an actual case from an intermediate appellate court in France involving a ne exeat right. *See also infra* at 37-38. The report described the court as having held that "the right of the mother to give or refuse consent to removal of the children, coupled with the father's award of 'custody,' had created a form of joint custody within the meaning of the Convention, since 'rights of custody' as contemplated there referred specifically to the right to determine the child's place of residence." *Id.* ¶ 10. The report noted that the "result and the reasoning of the [French court] . . . were broadly approved as being in the spirit of the Convention." *Id.*

The 1993 Special Commission Meeting. The report issued after the second Special Commission Meeting, held in January 1993, again confirmed the delegates' understanding that a ne exeat right constitutes a right of custody. At that meeting, delegates discussed the decision of a French trial court (*see infra* at 37-38) "to the effect that an order of the court granting custody which prohibited the custodian from removing the child from the court's jurisdiction without consent of the other parent constituted only a 'modality' attached to the right of

custody and not a situation of joint custody." *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction* 11 (1993). The report reflected the consensus among the delegates that ne exeat rights are rights of custody, noting that the French court's conclusion "gathered no support" at the meeting. *Id.*[14]

2. *Courts In Other Signatory States Have Overwhelmingly Construed The Ne Exeat Right As A Right Of Custody*

As this Court has frequently recognized, "the opinions of our sister signatories [are] entitled to considerable weight" in construing the terms of a treaty. *See Air France*, 470 U.S. at 404. This is particularly true here: Congress has expressly recognized the importance of a "uniform international interpretation of the Convention," 42 U.S.C. § 11601(b)(3)(B).

(i) Outside of the United States, the vast weight of authority agrees that a ne exeat right constitutes a right of custody for purposes of the Convention: of the eleven other signatories whose courts have

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[14] Although Mrs. Abbott, in her supplemental brief filed at the certiorari stage, sought to downplay the significance of the Commission's 1993 report by noting (at 2) that "[o]nly 23 signatory States even sent representatives to the 1993 Special Commission meeting," she failed to mention that as of that date the Convention had only twenty-eight signatories. *See* U.S. Dep't of State, Hague Convention Country List, *available at* http://travel.state.gov/family/abduction/hague issues/hagues issues 1487.html (last visited Sept. 14, 2009).

addressed the issue, nine (including six courts of last resort) agree that the ne exeat right does confer a right of custody. In the remaining two signatories, courts have issued conflicting opinions. Thus, not a single other signatory has expressly taken the position adopted by the Fifth Circuit.

One of the first cases confronting the significance of a ne exeat right arose in England. In *C v C*, (1989) 1 W.L.R. 654 (Eng. C.A.), a consent order entered after the parents' divorce in Australia provided that the mother had custody, both parents were joint guardians, and neither could remove the child from Australia without the other's consent. When the mother took the child to England without the father's consent, the father filed suit seeking the child's return under the Convention. Considering the question whether the father had rights of custody, Lady Justice Butler-Sloss acknowledged that although the father lacked "the right to determine the child's place of residence within Australia," he nonetheless "has the right to ensure that the child remains in Australia or lives anywhere outside Australia only with his approval." 1 W.L.R. 654. She concluded that the ne exeat right was therefore a right of custody and, thus, the child had been wrongfully removed. *Id.*

In 2006, judges of the House of Lords confirmed that a ne exeat right constitutes a right of custody for purposes of the Convention in *In re D (A Child)*, (2007) 1 A.C. 619, ¶ 37 (H.L. 2006). In that case, the child's mother brought him to England from Romania without the knowledge or consent of the father, who did not have a ne exeat right. In her opinion holding that the Convention did not require the child's return

to Romania, Baroness Hale of Richmond began by noting that "[h]itherto, . . . both in England and Scotland, the courts have regarded travel restrictions as giving rise to rights of custody." *Id.* ¶ 31. Following those courts, as well as "what appears to be the majority of the common law world," she emphasized that she "would hold that a right of veto does amount to 'rights of custody' within the meaning of article 5(a)." *Id.* ¶ 37.

Lord Hope of Craighead agreed. In his view, "a right to object to the child's removal to another country is as much a right of custody . . . as a right to determine where the child is to live within the country of its residence," and the absence of such a right was "decisive in this case." And citing cases from the United Kingdom holding that a ne exeat right is a right of custody, he deemed "[t]he issue . . . settled, so far as the United Kingdom is concerned." 1 A.C. 619, ¶ 10.

Five other courts of last resort – in Israel, South Africa, Ireland, Austria, and Germany – have similarly concluded that a ne exeat right is a right of custody. *See, e.g.*, H.C. 92 *Tournai v. Mechoulam* [1993] IsrSC (father had right of custody when mother "required the permission of the Court, not only to change her place of residence to Israel without the husband's consent, but even to leave for a visit to Israel"); CA 5271/92 *Foxman v. Foxman* [1992] IsrSC (father's right of custody breached when mother removed children from Canada to Israel in violation of agreement providing that "each parent needs the consent of the other to every significant change in the children's residency"; court emphasized that "every case of removing children from one

country to another without the consent of the parent who had a right to give or not give consent would be an abduction"); *Sonderup v. Tondelli* 2000 (1) SA 1171 (CC) (S. Afr.) (ne exeat right that generally prohibited both parents from removing the child from British Columbia without the other's consent constituted a right of custody); *M.S.H. v. L.H.*, 2000 3 IR 390 (Ir.) (father had rights of custody because father's right of joint parental responsibility under English law gave him the right to ensure that his children were not removed from the country without his consent); Oberster Gerichtshof [OGH] [Supreme Ct.] May 2, 1992, 2Ob596/91 (Austria) (court order preventing parents from taking children out of England without consent of the other parent was a right to determine the children's place of residence and thus a partial right of custody for Convention purposes); Bundesverfassungsgericht [BVerfG] [Fed. Const'l Ct. of Germany] July 18, 1997, 2 BvR 1126/97 (F.R.G.) (when father's consent required for children to leave the country with their mother, he had a joint right of custody).

In three additional signatory states, intermediate appellate courts have held that a ne exeat right constitutes a right of custody. Considering these cases is consistent with this Court's practice, particularly because they are directly on point. *See Air France*, 470 U.S. at 404 (relying on decision by French intermediate appellate court); *see also Olympic Airways v. Husain*, 540 U.S. 644, 662 n.2 (2004) (Scalia, J., dissenting) ("I note that our prior Warsaw Convention cases have looked to decisions of intermediate appellate foreign courts as well as supreme courts.").

Thus, in Australia, the Full Court of the Family Court of Australia held that the father had a right of custody when his child was taken to France in violation of a court order "restraining each of the parties from removing either of the children from the State of Western Australia and the Commonwealth of Australia." *In the Marriage of José Garcia Resina and Muriel Ghislaine Henriette Resina* (1991) App. No. 52, 1991 (Fam.) (Austl.). The Australian court followed the English Court of Appeal's decision in *C v C*, emphasizing the desirability of uniform interpretations of the Convention, the Convention's goal of ensuring the prompt return of children to the country of habitual residence, and the irony that would result if "the Court of Appeal in England declared the Australian Court to be one thing and the Australian court declared it to be another." *See also AJ v. FJ* [2005] CSIH 36 (Scot.) (agreeing that "rights of custody for the purposes of the Convention include rights of contact by virtue of the fact that [Scottish law] confers upon the contact parent the right to grant or withhold consent to the child's removal from the United Kingdom"); *Gross v. Boda* (1995) 1 NZLR 569 (C.A. Wellington) (N.Z.) (holding that father's "reasonable rights of visitation" conferred a joint right to determine the child's place of residence).

(ii) Mrs. Abbott's arguments that a ne exeat right is not a right of custody purportedly find support from decisions arising in just two countries, France and Canada. Notwithstanding her reliance on these decisions, however, the French decisions in fact lean in Mr. Abbott's favor: although a lone trial-level court has indicated that a ne exeat right is not a right of custody, a French appellate court has held to

the contrary. And in Canada, the arguments favoring Mrs. Abbott's position are merely dicta.

France. In Decision of 23 Mar. 1989, *Public Ministry v. M.B.*, C.A. Aix-en-Provence, 6e ch., Mar. 23, 1989, Rev. crit. dr. internat. Privé 79(3), juill.-sept. 1990, 529, 533-35, note Lequette, the father had custody of children pursuant to an English court order, which also included a ne exeat right; he subsequently took the children to France without having obtained the mother's consent. The appellate court determined that the mother had rights of custody and ordered the children's immediate return to England. It explained that "by attributing to the mother the right to accept or refuse the removal of the children's residence outside of a certain region, the decision of 27 November 1987 organized a joint exercise of rights of custody within the meaning of the Hague Convention."

Despite the decision in *M.B.*, a lone trial court in a different region of France subsequently rejected an analogous claim. In *Attorney for the Republic at Périgueux v. Mrs. S*, T.G.I. Périgueux, Mar. 17, 1992, Rev. cr. dr. internat. Privé 82(4) oct.-déc. 1993, 650, 651-53, note Bertrand Ancel, D. 1992, note G.C., the mother had "custody" of the children but was required by a U.K. divorce decree to raise her children in either England or Wales. After the mother took the children to France, the father filed a suit there for the children's return. The mother countered that the father lacked custody rights and that under the European Convention on Human Rights she was "free to leave any country." The court rejected the father's Hague Convention claim. It reasoned that the Convention was intended to apply

only when "non-custodial parents tak[e] the child to another State," and it suggested that the father had in any event consented to the child's move. Finally, the court agreed with the mother's European Human Rights Convention claim, reasoning that requiring the child's return "would end up denying [her] fundamental liberty in that the mother would have to follow her child within the framework of a forced return to England and Wales."

Canada. The Supreme Court of Canada has not expressly addressed whether a ne exeat right in a permanent custody order constitutes a "right of custody" for purposes of the Convention. While some cases do contain language that might be read to express skepticism about the status of ne exeat rights as a right of custody, decisions by lower courts and executive-branch officials directly addressing the issue show that this language is at most dicta.

In *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (Can.), the mother had interim custody, the father had interim access (visitation) rights, and an interim Scottish court order prohibited the child from being taken out of Scotland. After the mother took the child to Canada, the father filed suit under the Convention to seek the child's return. The court ordered the child's return, deeming it "clear that the non-removal clause was inserted into the custody order . . . to preserve jurisdiction in the Scottish court to decide the issue of custody on its merits in a full hearing at a later date," and that the Scottish court thus held "rights of custody" for purposes of Article 3. That the clause would preserve the father's access rights, the court continued, "would be merely a corollary effect of the clause."

In his opinion for the Court, Justice La Forest emphasized "the purely interim nature of the mother's custody in the present case." In particular, he explained, he "would not wish to be understood as saying the approach should be the same in a situation where a court inserts a non-removal clause in a permanent order of custody." In the latter scenario, he explained, the ne exeat clause is "usually intended to ensure" access rights, which were "not intended to be given the same level of protection by the Convention as custody."

Two years later, in *D.S. v. V.W.*, [1996] 2 S.C.R. 108 (Can.), the Canadian Supreme Court rejected a parent's claim for her child's return that was based on an *implicit* ne exeat right. In so holding, the court acknowledged that "*Thomson* did not determine whether an implicit restriction on removing a child under a court order or statute confers rights of custody within the meaning of the Act on either the court or the non-custodial parent," but in its view the *Thomson* court's "limitation of the effect of an express non-removal clause in a permanent custody order casts serious doubt on the validity of the respondent's argument."

Six of the nine justices in *D.S.* expressed only qualified support for the opinion's reasoning; in another opinion issued that same day, Justice McLachlin – joined by five others – rejected the argument that the parent responsible for the child's day-to-day care "has the 'right' to move where he or she pleases and should not be restricted in doing so by the desire of the access parent to maintain contact with the child." *Gordon v. Goertz*, [1996] No. 24622,

1996 Can. Sup. Ct. LEXIS 48, at *57-*58 (Can. May 2, 1996).

Decisions in Canada's lower courts, where courts that have specifically considered the question have held that a ne exeat right *is* a right of custody, further confirm that the language in the Canadian Supreme Court's opinions on which Mrs. Abbott relies is simply dictum. For example, in *S.T. v. J.D.H./J.T.* [1997] 1997 BCAC 35 (Can.), a court order provided that the children would "live with" the mother, while the father had a ne exeat right. The mother took the children out of the U.K. without the father's consent. In the suit that followed, the court rejected the mother's argument that the father lacked rights of custody. It acknowledged the Supreme Court's decision in *Thomson*, but it reasoned that "a 'right of custody', i.e. the right to determine the child's place of residence, was reserved by the English court to be exercised with the consent of the respondent or by leave of the court." *See also Hewstan v. Hewstan* [2001] 2001 BCSC 368 (Can.) (agreeing that "one of the father's rights of custody is the right to veto the removal of the child from the jurisdiction, and the removal of the children without his consent is a breach of his rights of custody").[15]

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[15] Even if the Canadian Supreme Court had definitively held that a ne exeat right in a permanent custody order is not a right of custody, such a holding would be entitled to little deference because it would rest on flawed reasoning.

First, the distinction between interim and permanent ne exeat rights makes little sense given the nature of custody disputes, which – as this case illustrates perfectly – often

Equally telling is the reaction of some Canadian Central Authorities to the Court's decisions in *Thomson* and *D.S.* As of 2000 – that is, five years after the Court's decision in *Thomson* – the Central Authorities of Ontario and British Columbia reported

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involve a series of proceedings. Here, at the time of A.J.A.'s abduction, the Chilean family court had before it two pending proceedings in which Mr. Abbott was seeking to expand his rights with regard to his son. There was no need for that court to issue an interim ne exeat order, however, because two such provisions were already in place under Chilean law and the January 13, 2004 order.

Second, the Canadian Supreme Court's holding in *Thomson* that an interim ne exeat order was a right of custody presumably relied on a determination that the ne exeat right conferred the right to determine the child's place of residence. But there is no reason why a permanent right to determine the child's place of residence is less of a "right of custody" than the same right on an interim basis. All that matters is that at the time of the child's abduction, the parent or court had the right to determine the child's place of residence.

Third, the Canadian court's assumption that courts are only concerned with preserving jurisdiction while custody disputes are pending before them cannot be reconciled with the purposes of the Convention, which rests on the premise that courts in the child's country of habitual residence are almost always best suited to resolve the merits of custody disputes, whether they were pending at the time of the child's abduction or not.

Fourth, the Canadian court's supposition that the permanent ne exeat right is merely intended to ensure that a parent will have access to his child is simply erroneous. As discussed *supra* at 16 17 & 22-23, a ne exeat right also allows a parent to play a significant role in shaping the child's upbringing and cultural identity.

that, in the absence of a contrary decision, they treated "non-removal clauses in final orders as creating rights of custody under the Convention." Martha Bailey, *Canada's Implementation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction*, 33 N.Y.U. Int'l J. L. & Pol. 17, 31 (2000).

B. The Negotiating History (*Travaux Préparatoires*) Of The Convention

1. The history of the Convention makes evident that the factual scenario presented by this case was in fact one of the earliest problems the Convention was designed to resolve. The very first document in the Convention's official *travaux préparatoires* is a questionnaire prepared by the Permanent Bureau's First Secretary for distribution to the members of the Hague Conference on Private International Law. *See* Adair Dyer, *Questionnaire and Report on International Child Abduction by One Parent*, *in* HAGUE CONFERENCE ON PRIV. INT'L LAW, ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 9 (1980). The questionnaire began by describing "five types of situations which are considered to constitute 'child abduction' for the purposes of this questionnaire"; the fifth scenario was one in which "[t]he child was removed by a parent from one country to another in violation of a court order which expressly prohibited such removal." *Id.*

Discussions during the negotiations leading up to the Convention further confirm that although the drafters of the Convention declined to provide an automatic return remedy for violations of access rights, they nonetheless intended the term "rights of

custody" to be broadly defined to include the ne exeat right.

First, delegates at both the March and November 1979 preparatory Special Commission meetings reiterated that all five scenarios described in the Dyer Questionnaire – including the removal of a child in violation of a ne exeat right – constituted "abductions" that should be covered by the Convention. *See* TOME III, *supra*, at 163 & 183. Notably, no one suggested at either of these meetings that the ne exeat scenario should be treated any differently than the other scenarios described in the questionnaire, all of which would be regarded as clear violations of rights of custody. *See id.* at 9 (describing scenarios).

Second, the Preliminary Draft Convention, adopted by the Special Commission preparatory meeting in November 1979, contained a draft Article 3 that was, as relevant here, virtually identical to the final version of Article 3: the draft provided that a removal was wrongful "when it is in breach of rights of custody actually exercised by a person [or institution], either jointly or alone," TOME III, at 166, while the final version provides that a removal is wrongful when "(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone . . . and (b) at the time of removal . . . those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." Pet. App. 28a.

At the diplomatic conference convened in October 1980 to adopt a final text, the Canadian delegation proposed adding the words "or access" after the words

"breach of rights of custody" in the draft Article 3, TOME III, at 262 – a change that would have also required the child's automatic return if the left-behind parent's access rights had been breached. One of the Canadian delegates, Allan Leal, explained that such a proposal was intended to ensure that the return remedy would apply to a scenario in which the father holds a ne exeat right but the mother nonetheless takes the child out of the country without the father's permission. *Id.* at 266.

A representative from the Netherlands, C.D. van Boeschoten, responded that such an example "coincided with an actual case in which he had been professionally involved." He emphasized that, "in such a case and under the present terms of the Convention the abducted child would have to be sent back immediately." TOME III, at 266.

And John Eekelaar, a representative from the Commonwealth Secretariat, an intergovernmental association based in the United Kingdom, *see The Commonwealth@60, Who We Are, at* http://www.thecommonwealth.org/Internal/191086/191247/the_commonwealth/ (visited Aug. 18, 2009), expressed concern regarding "the potentially very wide scope" of the Canadian delegation's proposal, but shared the delegation's desire to ensure that the return remedy would be available for "cases similar to Mr. Leal's . . . hypothesis." He suggested, however, that "a possible solution to this problem lay in the terms of article 5 which could cover cases where the non-custodial parent had a right to be consulted." TOME III, at 266.

Crucially, there were no objections to the comments by either van Boeschoten or Eekelaar, and

the Canadian proposal to expand the Convention's return remedy to include access rights was soundly defeated. *See* TOME III, at 267. The comments by van Boeschoten and Eekelaar, the defeat of the Canadian proposal, and the fact that the text of the draft remained (as relevant here) unchanged all lead to the conclusion that delegates at the meeting understood the text of the draft to encompass ne exeat rights as a right to determine the child's place of residence and, thus, a right of custody requiring automatic return.[16] *Accord* Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L L.J. 41, 46 (2003).

2. In *Croll*, the Second Circuit relied heavily on the statement by A.E. Anton, the chair of the Hague Conference Commission, suggesting that the Commission had "rejected" the view that ne exeat rights fall under "rights of custody," *Croll*, 229 F.3d at 141-42 (citing A. E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP.

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[16] Indeed, just a few months later, Eekelaar wrote that a wrongful removal would occur "if the court had specifically stated that a child should not be removed from the jurisdiction without the consent of one parent (or the court)." He reasoned that "although the expression 'custody' may not have been used, that parent would possess a right to determine the child's place of residence which falls within the protection of the Convention." Commonwealth Secretariat, The Hague Convention on the Civil Aspects of International Child Abduction: Explanatory Documentation Prepared For Commonwealth Jurisdictions 16-17 (Feb. 1981).

L.Q. 537, 546 (1981)). However, Mr. Anton's statement does not undermine the conclusion that the drafters intended a ne exeat right to constitute a right of custody. First, as the majority in *Croll* acknowledged, Anton actually indicated that the issue "is less clear," because Article 5 only "suggests" such a view. Anton, *supra*. Second, Anton wrote the article purely in his personal capacity, *id.* at 537 n.*, and there is no reason to favor the personal views of a single drafter over the actual drafting history of the official Commission members. *See supra* Part I.B (discussing history of Convention).[17]

But to the extent that courts are inclined to credit the personal views of those who participated in the negotiations, they must also take into consideration the contrary views of John Eekelaar, who opined unequivocally that a ne exeat right is a "right of custody." *See supra* n.16.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fifth Circuit should be reversed.

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[17] Indeed, Anton's views were not shared even by the courts in his own country. Rather, as discussed *supra* at 33-36, courts in the United Kingdom have consistently held that a ne exeat right does constitute a right of custody.

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RESPONDENT'S BRIEF

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No. 08-645

IN THE
Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,
Petitioner,

v.

JACQUELYN VAYE ABBOTT,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction requires that a child be returned to his country of habitual residence if he has been "wrongfully removed" from that country. Removal is "wrongful" under the Convention if it occurs in breach of "rights of custody," but not if it occurs in breach of "rights of access." The question presented is:

If a *ne exeat* statute or order requires a custodial parent to seek judicial permission to take a child out of the country without a noncustodial parent's consent, does that provision create "rights of custody" in a noncustodial parent who only has access rights?

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INTRODUCTION

The 1980 Convention on the Civil Aspects of International Child Abduction provides for the mandatory return of children removed to foreign countries in breach of "rights of custody." Hague Convention on the Civil Aspects of International Child Abduction art. 12, Oct. 25, 1980, T.I.A.S. No. 11670 [hereinafter Convention]. To warrant mandatory return, these custody rights must have been attributed by the law of the state of the child's habitual residence, and "actually exercised" by the person having "care of the person of the child." Convention arts. 3, 12, 13. No such remedy is provided for removals in breach of rights of access.

Petitioner Timothy Abbott has no custody rights over his son under Chilean law. The child's mother, Respondent Jacquelyn Abbott, has sole and exclusive custody. Petitioner has not had custodial care of his son at any relevant time, and he has not actually exercised *any* right with regard to his son other than access rights. Petitioner nonetheless claims the Convention's term "rights of custody" means something other than the well-accepted ordinary sense of the term, even though the Convention contains an express definition capturing that ordinary meaning. He contends that the Convention supersedes the allocation of custody rights under Chilean law. He further contends that the Convention recognizes *ne exeat* provisions as a species of "joint custody rights" within the meaning of the Convention, even though the Convention delegates defeated a proposed amendment to extend

remedies to access rights protected by *ne exeat* orders. Finally, even though the Convention's purpose is to protect the child's emotional security by preserving existing custodial relationships, Petitioner asserts that the Convention mandates his son's return to Chile even if it means severing the son's relationship with Respondent, the only person who has had custody of him since 2003.

The plain language, structure, and purpose of the Convention, and the *travaux preparatoires*, foreclose Petitioner's interpretation, as most federal courts of appeals (including the Fifth Circuit below) and the best-reasoned foreign decisions hold.[1] This Court should affirm the judgment below.

STATEMENT OF THE CASE

I. Background on the Convention

The Convention was adopted in 1980 by the Fourteenth Session of the Hague Conference on Private International Law. The Convention was aimed at alleviating the harmful impact on children of abductions that disrupt existing custodial relationships, which typically involved removal of a child by a noncustodial parent to a more favorable jurisdiction "to obtain a right of custody from the authorities of the country to which the child has been taken." Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* [hereinafter Pérez-Vera], in ACTES ET DOCUMENTS DE LA

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[1] *See* Pet. App. 1a; *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000); *Gonzales v. Guiterrez*, 311 F.3d 942 (9th Cir. 2002); *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003); *infra* at 53-58 (discussing foreign cases).

QUATROZIÈME SESSION, TOME III [hereinafter TOME III], 426-476, at 444-45 (1982).[2]

The Convention binds its signatories to return a child (up to the age of 16 years) who was wrongfully removed from the country of habitual residence, subject to enumerated exceptions. Convention arts. 4, 12, 13. Given the Convention's primary purpose to preserve the custodial *status quo*, the right-of-return remedy is triggered only by a breach of actually exercised custody rights. As result, the Convention draws a sharp distinction between "rights of custody" and "rights of access." *Id.* art. 5. Under Article 3 of the Convention, the removal of a child is "wrongful" when

> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

---

[2]"[Professor Pérez-Vera's] explanatory report is recognized by the [Hague] Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,503 (1986)

Convention art. 3.

Despite differences in terminology across legal systems, custody was understood to refer to "a complex of rights, duties and powers with the respect to the person of the child." Jacques Foyer, *General Report, Legal Representation and Custody of Minors, Proceedings of the Fourth Colloquy on European Law* (1974) (excerpted in Adair Dyer, *Questionnaire and Report on International Child Abduction by One Parent, Annex I)*, TOME III, 52-56, at 53 [hereinafter Foyer Report]. This complex of rights "included" a variety of concrete rights relating to physical care, "choice of the child's residence," education, medical care, discipline, contracting for employment of the child, and consent to marriage. *Id.* at 53-54.

Article 5 accordingly defines "rights of custody" to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Convention art. 5(a). "Rights of access," in contrast, "shall include the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention art. 5(b).

The Conference considered the problem of breaches of access rights, but chose not to extend the return remedy to such breaches. Pérez-Vera at 444-45. Holders of access rights are only entitled to have the "Central Authority" of the country to which the child has been removed help them "make arrangements for organizing or securing the effective exercise of access." Convention art. 21.

Even where a "right of custody" is implicated, "[t]he judicial duty to order return of a wrongfully

removed or retained child is not absolute." 51 Fed. Reg. at 10,509. The applicant must show that he actually exercised his right of custody at the time of removal, or would have done so but for the wrongful removal. Convention art. 3. Conversely, a person opposing the return may defeat the application by proving that "the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention." *Id.* art. 13(a). Thus, an applicant is not entitled to a mandatory-return remedy absent at least "some preliminary evidence that he actually took physical care of the child[.]" Pérez-Vera at 448; *see also* 51 Fed. Reg. at 10,507.

Return may also be refused if a mature child objects to it, or if return would expose the child to "a grave risk" of "physical or psychological harm or otherwise place the child in an intolerable situation," or if return would be inconsistent with human rights. Convention arts. 13, 20. Combined, these limitations reflect "the paramount importance" of "the interests of children ... in matters relating to their custody." Convention, pmble.

The Convention is implemented in the U.S. by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11611.

II. Statement of Facts

A. The Abbotts' Custody Dispute in Chile

Respondent Jacquelyn Abbott is a United States Citizen. Pet. App. 1a. She married Petitioner Timothy Abbott, a British Citizen, in 1992. JA 55. Their only son, A.J.A., was born in Hawaii in 1995 and is a United States Citizen. JA 55. Petitioner's work as an astronomer took the family to Chile in 2002. JA 17, 55. In March 2003, Respondent and Petitioner separated and began litigating over A.J.A.'s custody in the Chilean courts. Pet. App. 1a-2a.

By law, Respondent gained custody of A.J.A. upon separation. CÓDIGO CIVIL DE CHILE art. 225 (Chile). Petitioner petitioned the Chilean family court "for a direct and regular visiting schedule." JA 9. Respondent opposed any visitation because she had "been the victim of domestic violence" and A.J.A. had "also been the victim of physical and psychic abuse by [his] father." JA 10. A psychologist testified that "the minor must be protected until it is clear that the father can control himself in conflictive situations." JA 11. She recommended that Petitioner undergo psychiatric evaluation and "receive appropriate assistance in regard to demonstrating his ability to control himself under pressure." JA 11-12. Respondent submitted evidence of injuries she had suffered and a copy of a criminal complaint against Petitioner from Hawaii. JA 12. She also submitted a complaint filed against Petitioner for violation of a Chilean domestic-violence statute (Law No. 19,325, Aug. 19, 1994 (Chile)). JA 12. A report from the

Family Orientation and Diagnostic Center, however, found that Petitioner did not pose a danger to the child and recommended that the father have visitation rights to maintain his bond with his son. JA 12-13.

The Chilean court granted Petitioner provisional visitation, and the parties agreed on a limited visitation schedule. JA 13. In January 2004, Petitioner refused to return A.J.A. to his home at the agreed-upon time, violating the provisional visitation agreement. *Id.* Believing that Petitioner had obtained a British passport for A.J.A. to take him to England, and stating that she feared for the child's safety, Respondent petitioned the court for an *orden de arraigo* (*ne exeat* order) prohibiting A.J.A. from leaving the country. Pet. App. 17a, 68a-70a. This proposed order was directed to the child's person, rather than at either parent. It contained no consent provisions. It simply asked that the court "immediately decree the ne exeat of the minor" and notify the police. Pet. App. 68a-70a; *see* JA 20-21. The court granted the order on January 13, 2004, and six days later awarded Respondent "immediate custody" of A.J.A., an order that was only enforced with police involvement. JA 13, 20-21, 33.

Expressing dismay that the parties "have even tried to take the law into their own hands," the court fixed its own visitation schedule, giving Petitioner visitation every other weekend and on Wednesdays after school until 8:00 pm. JA 15. The court cited A.J.A.'s legal right to maintain a relationship "with the parent who does not have custody." JA 14.

In this period, Petitioner filed a petition for custody. JA 17, 19-20. Citing A.J.A.'s interest as paramount, the court denied the petition, finding that "[t]he minor is significantly more emotionally tied to his mother, who has assumed his breeding in a totally satisfactory way." JA 28-29.

Due to visa restrictions, Respondent was unable to work or lease an apartment, and she did not receive timely support payments from Petitioner. JA 70 (adverting to 2005 Chilean court order finding that Petitioner owed $23,794 in back child support). On August 26, 2005, Respondent and A.J.A. relocated to Texas. *Id.*

B. Petitioner Attempts to Enforce His Visitation Rights in U.S. Courts

In January 2006, Petitioner filed an action in Texas state court under the Texas Family Code seeking enforcement of the Chilean court's visitation orders and possession of the child to remove him to Chile. Pet. App. 17a. Although state courts have concurrent original jurisdiction over actions arising under the Convention, Petitioner did not assert rights under the Convention. *See* 42 U.S.C. § 11603(a); Pet. App. 48a. Modifying the Chilean visitation-rights order, the court granted Petitioner "liberal periods of possession of A.J.A." while Petitioner remained in Texas, but otherwise denied his petition. JA 41-43; Pet App. 17a-18a.

Petitioner next filed a complaint in the U.S. District Court for the Western District of Texas. JA 52-58. Instead of seeking to enforce his visitation rights, Petitioner petitioned for an order returning A.J.A. to Chile under Article 12 of the Convention.

JA 53-54. Even though he conceded that Respondent "was granted daily care and control of [A.J.A.]" and that Petitioner had only been granted "access," Petitioner asserted that A.J.A.'s removal to the U.S. breached his "rights of custody" because it violated the *ne exeat* order and Article 49 of Chilean Minors Law 16,618. JA 53, 55-56.

Article 49 provides that a child may not depart Chile without authorization of a parent or third party in five circumstances. Pet. App. 61a. For legitimate children, authorization is required from both parents in the absence of a custody entrustment, or from the parent or third party to whom the judge had "entrusted custody." *Id.* If the judge has ordered visitation, "authorization of the father or mother who has the right to visit a child shall also be required." *Id.* If authorization is denied or unobtainable, "it may be granted by the Family Court Judge in the location where the minor resides." *Id.* 62a. Petitioner claimed that the requirement that the custodian seek authorization from the visitation-rights holder constituted "rights of custody" under the Convention. JA 56.

The District Court denied the application, concluding that it "defies the ordinary meaning of the term 'custody' to conclude that Mr. Abbott gained rights of custody in A.J.A. as a result of the Chilean court's *ne exeat* order." Pet. App. 23a. The court noted that "[Ms.] Abbott continued caring for A.J.A. and maintained control over the daily decisions regarding raising A.J.A., including determining A.J.A.'s place of residence." *Id.* The *ne exeat* order thus "did nothing to affect Mr. Abbott's say (except by leverage) about any child-rearing issue other than the

child's geographical location in the broadest sense." *Id.* The District Court further observed that "the clear intent of the Hague Convention is to distinguish between rights of access and rights of custody, furnishing greater protection for [the] parents with rights of custody." *Id.* Consequently, while the court believed that Respondent's relocation violated the Chilean court's *ne exeat* order and frustrated Petitioner's visitation rights, it recognized that this was irrelevant to whether the child's return was mandatory under the Convention. Pet. App. 24a.

The Fifth Circuit affirmed, relying on the extensive analysis of the treaty language and drafting history in *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000). Pet. App. 14a. It held that "the Hague Convention clearly distinguishes between 'rights of custody' and 'rights of access,'" and recognizing *ne exeat* provisions protecting rights of access as "'rights of custody'...would be an impermissible judicial amendment of the Convention." *Id.*

SUMMARY OF THE ARGUMENT

The 1980 Convention's goal is maintenance of the custodial *status quo*. It requires Contracting States to return a child to his country of habitual residence if the left-behind parent has rights of custody but not if he has only rights of access. Petitioner concedes that he has no rights of custody under Chilean law. Nevertheless, he argues that the *ne exeat* provisions designed to protect his access rights give rise to "rights of custody" under the Convention that entitle him to seek mandatory return of A.J.A. to Chile.

Petitioner's reading of the Convention, implausible on its face, is untenable. His claim that

the Convention "autonomously" defines custody rights, and entitles this Court to disregard the allocation of custody rights under Chilean law, defies Article 3's plain command that the Convention only protects custody rights "attributed ... under the law of the State in which the child was habitually resident." Convention art. 3.

Further, there is no basis for Petitioner's claim that the term "rights of custody" lacks its ordinary meaning, and thus even noncustodial laws can give rise to "rights of custody" so long as they constitute in some sense a "right to determine the child's place of residence." Convention art. 5. Treaty terms are presumed to have their ordinary meaning. In 1980, "rights of custody," in the ordinary sense of the term, referred to a complex of rights related to the care of the person, including the right to determine the child's place of residence. That is exactly the definition used in Article 5 of the Convention.

Moreover, the *ne exeat* clauses at issue here do not vest Petitioner with a "right to determine the child's place of residence." Article 5 refers to the affirmative right to determine residency incident to a right of custody in the ordinary sense. *Ne exeat* clauses are not sources of rights; they protect the court's jurisdiction over the person. Even if a *ne exeat* consent requirement were a "right," it would be a distinct right to block the child's departure from Chile. It is a confusion of terms to say that Petitioner's ability to exercise right A (blocking A.J.A.'s departure) to limit Respondent's exercise of right B (residency determination) means that Petitioner shares right B. In any event, the *ne exeat* clauses afford Petitioner no veto over the child's

departure from Chile; they simply require the matter to be decided by court.

Finally, Article 3 and 13 confirm that the Convention protects only custody rights in their ordinary sense. The rights must be "actually exercised" by the person "having care of the person of the child," which precludes any claim of custody rights by someone like Petitioner who has only access rights.

The *travaux preparatoires*, largely ignored by Petitioner and his *amici*, confirm that custody rights must be understood according to the plain meaning ascribed to them in Article 5. The reports accompanying the preliminary and final Convention drafts declare repeatedly that custody rights are those attributed by the Contracting State, are limited to rights of care in their ordinary sense, and must be actually exercised by the person having care of the child. Indeed, the delegates considered and resoundingly defeated a proposal to amend the Convention to grant remedies for access rights protected by *ne exeat* clauses.

Petitioner would convert the Convention into a jurisdictional convention for enforcing foreign court orders. But the First Commission specifically abandoned efforts to create a system for recognition of foreign jurisdiction, and the subsequent 1996 Convention that explicitly had that goal has attracted few signatories. The Convention should not be transformed by judicial amendment into a jurisdictional convention for the enforcement of *ne exeat* orders.

The Convention's limited purpose is to protect the child's interests by preserving the actual and existing custodial relationships that existed prior to removal. Granting a mandatory-return remedy to access-rights holders does not restore any custodial relationships; indeed, in many cases it will sever custodial relationships if (as may frequently happen) the sole custodian cannot re-enter the state to which the child is returned.

Because the Convention's text, purpose, and history foreclose Petitioner's theory, resorting to the other doctrines on which he relies is unnecessary. None supports him in any event. Court decisions and reports of the First Commission are not evidence of the contracting parties' post-ratification conduct, much less their original intent. And while foreign court decisions are sometimes entitled to weight, the foreign courts here are divided, and the persuasive decisions support Respondent. Finally, no deference is due to the State Department's newly announced position. The State Department offers no evidence relevant to contractual intent, and its original statements in support of ratification favor Respondent. This Court should affirm the judgment below.

ARGUMENT

I. *Ne Exeat* Clauses Do Not Give Rise to "Rights of Custody" Protected by the Convention.

Petitioner's textual argument relies on isolating eight words in Article 5 from the rest of the Convention. According to Petitioner, the "right to determine the child's place of residence" is a "right of

custody," Convention art. 5(a), and the Chilean *orden de arraigo* and Minors Law grant him a "veto" of Respondent's choice of residence for the child. Thus, even though the Chilean court granted Petitioner only access rights, he claims entitlement to an order from an American court returning A.J.A. to Chile. Petr. Br. 10-11.

Petitioner misconstrue Articles 5. Plain meaning cannot be derived from isolated textual phrases. *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 99 (1992) ("[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law.") (citation omitted). Treaty interpretation begins "with the text of the treaty and the context in which the written words are used." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) (citation omitted). "[A]ll parts of the treaty are to receive a reasonable construction with a view to giving a fair operation to the whole." *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921); *see also United States v. Alaska*, 521 U.S. 1, 32 (1997) (rejecting interpretation that "makes a sensible application of other provisions of the Convention impossible").

The Convention's text, considered as a whole, belies Petitioner's claim that *ne exeat* clauses generate "rights of custody." That is contrary to the ordinary meaning of the term at the time of the Convention, when *not a single* Contracting State had identified a *ne exeat* clause as the source of custody rights.

A. The Convention Recognizes "Rights of Custody" Attributed by the State of Habitual Residence.

The premise of Petitioner's claim is that the Convention "autonomously" defines rights of custody, regardless of how the Contracting State of the child's place of habitual residence attributes custodial rights. Yet, they cite nothing in the text of the Convention (or even the *travaux preparatoires*) for that proposition; they cite only a 1989 First Commission report. Petr. Br. 3; U.S. Br 12.

The Convention explicitly protects only "the rights of custody" recognized by the Contracting State of habitual residence. Article 1 declares the "objects of the present Convention" to include "ensur[ing] that *rights of custody* and of access *under the law of one Contracting State* are effectively respected in other Contracting States." Convention art. 1(b) (emphasis added). The Convention proceeds to distinguish custody from access rights in defining wrongful removals redressed by the mandatory-return remedy. *Id.* arts. 3, 12. The removal is "wrongful" only if "it is in breach of *rights of custody attributed* to a person, an institution or any other body, either jointly or alone, *under the law of the State in which the child was habitually resident* immediately before the removal or retention." *Id.* art. 3(a) (emphasis added). The rights of custody "may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State," but in all events the applicant must have been granted

custody rights by the Contracting State of habitual residence. *Id.* art. 3.

B. Article 5's Definition of "Rights of Custody" Does Not Depart From Ordinary Meaning and Does Not Encompass *Ne Exeat* Clauses.

The natural reading of Articles 1 and 3 is that a court should look to the custody laws of the state of habitual residence to determine whether "rights of custody" exist.

Petitioner argues that Article 5's definition of "rights of custody" supersedes the allocation of custody rights under the law of the Contracting States. In Petitioner's view, Article 5 serves as a charter for foreign courts to redefine *noncustodial* rights under the domestic law of the state of residence as *custodial* rights under the Convention. Petr. Br. 3. Petitioner misconceives both the meaning and purpose of Article 5.

The definition of "rights of custody" in Article 5 does not substantively expand what constitutes a right of custody "under the law of the State in which the child was habitually resident." *Id.* art. 3(a). It simply describes the term "rights of custody," which was not universally used in the legal systems of all Contracting States, consistently with its ordinary meaning to distinguish it from rights of access.

Treaties are to be interpreted according to "the received acceptation of the terms in which they are expressed." *United States v. D'Auterive*, 51 U.S. (10 How.) 609, 623 (1851). "The clear import of treaty language controls unless 'application of the words of

the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963)); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 128 (1989). Article 5 captures the accepted and ordinary understanding of "rights of custody" at the time of the Convention. It does not seek to define *ne exeat* orders protecting access rights idiosyncratically, converting them into custody rights.

All jurisdictions necessarily allocate custody rights. Children must be under the care of adults, and the law of the Contracting State must determine which adults have the legal right to exercise that care. But while all jurisdictions grant substantive legal "rights of custody," not all do so *eo nomine*.

> In some continental [European] States, legal representation was a broad concept encompassing protection both of the person and of the minor's property, custody ('*garde*') being merely one of the consequences of this institution. Furthermore, the concept was closely bound up, when the parents were living, with that of the '*patria potestas*' of Roman law, which as legal systems evolved had taken the form either of traditional paternal authority or of parental authority shared between father and mother[.]

Foyer Report at 53. Common law and Nordic countries, on the other hand, generally "distinguished between custody, which entailed powers in respect of the child's person, and guardianship, which was concerned essentially with property." *Id.*

Nonetheless, by the mid-1970's, the term custody rights had an accepted meaning. "A consensus appeared to have emerged regarding the definition of custody *as a complex of rights*, duties and powers *with respect to the person of the child*," to be "exercised in the child's interest, particularly in ensuring his physical, mental and social well-being." *Id.* (emphasis added). This complex of rights "included" a variety of concrete rights, including "choice of the child's residence." *Id.* at 53-54.

Article 5 simply defines "rights of custody" in keeping with this ordinary meaning. It provides that "rights of custody," whatever the nomenclature of the particular Contracting State, "*shall include* rights relating to the care of the person of the child and, *in particular*, the right to determine the child's place of residence." Convention art. 5(a) (emphasis added). This accords with the accepted understanding of the term discussed above. "'[C]ustody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things.'" *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142, 148 (2d Cir. 2008) (citation omitted); *Croll v. Croll*, 229 F.3d at 138 (quoting *Black's Law Dictionary*'s [390 (7th ed. 1999)] definition of "parental custody" as "'[t]he care,

control, and maintenance of a child awarded by a court'"). In keeping with the plain meaning, Article 5 refers to the right to determine the child's residence as a "particular" right of care, singled out because it is generally abridged by the removal of children to foreign countries.

The phrase "shall include" cannot be read to engineer a departure from the ordinary meaning of "rights of custody." The term "includes" often signifies the full breadth of the ordinary meaning of the term. *See, e.g., NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995) ("The phrasing of the Act seems to reiterate the breadth of the ordinary dictionary definition, for it says '[t]he term "employee" shall include *any* employee.'"); *Snider v. All State Administrators, Inc.*, 414 U.S. 685, 686 (1974) (construing rule providing that "'Printing, as the term is used in these rules, *shall include* any process capable of producing a clear black image on white paper" as "requir[ing]" documents to be the product of such process) (emphasis added) (citation omitted).

Even if the rights enumerated in the definition are merely examples, the term "rights of custody" bears its ordinary meaning, unless the examples are clearly incompatible with the ordinary meaning. *See Boyle v. United States*, 129 S. Ct. 2237, 2243 & n.2 (2009); *Sumitomo*, 457 U.S. at 180. Here, there is no incompatibility; rights of care and in particular residence determination are encompassed within the ordinary understanding of rights of custody. Thus, the Convention's declaration that removal or retention of a child is wrongful if "in breach of rights of custody ... attributed ... under the law of the

[Contracting] State in which the child was habitually resident" in Article 3 clearly refers to those rights, however described in the State's law, that are substantively rights of custody in the ordinary sense.

Article 5 does not encompass *ne exeat* clauses that merely protect the access rights that a non-custodian like Petitioner holds. Indeed, Petitioner and his *amici* cite no evidence from before 1980 that *ne exeat* clauses were ever thought in any jurisdiction to give rise to "joint" rights of custody. This Court should not impute to the Contracting States the intent to have foreign courts fashion newfangled rights of custody never previously so recognized. *See, e.g., The Amiable Isabella*, 19 U.S. 1, 71 (1821) ("Neither can this Court supply a *casus omissus* in a treaty, any more than in a law.").

C. *Ne Exeat* Clauses Do Not Grant Any "Right to Determine the Child's Place of Residence."

Even if *arguendo* the Convention intended to divorce the "right to determine the child's place of residence" from ordinary custody rights, that phrase cannot encompass *ne exeat* clauses. In Article 5, "[t]he right specified is the 'right to *determine*' a child's place of residence, thereby implying an active power to choose (and change) the residential address, at will, as a matter of parental and personal judgment." *Croll*, 229 F.3d at 139 (emphasis added). "A parent with custodial rights has the *affirmative* right to determine the country, city, and precise location where the child will live." *Gonzalez v. Gutierrez*, 311 F.3d 942, 949 (9th Cir. 2002). To determine means "[t]o decide or settle conclusively

and authoritatively." *American Heritage College Dictionary* 379 (3d ed. 1997). The *ne exeat* clauses at issue here grant no such affirmative right.

To begin, Petitioner's continued reference to *ne exeat* "rights" as a type of substantive custody rights is doublespeak. A *ne exeat* order is, literally, an order "that he not leave"; it is a device to maintain jurisdiction and enforce substantive rights. *Ne exeat* clauses are not themselves sources of substantive rights.

Petitioner variously claims that the ability to "veto" or "influence" the custodian's determination of residence itself constitutes a "right to determine" residence. Petr. Br. 15-16. But, in ordinary usage, the right to determine something is the right to decide it, not to restrict or influence another's determination. The President's veto power is not a right to make laws. Similarly, a citizen's exercise of the First Amendment right to march may require seeking a municipality's consent, but that does not mean the municipality has "partial" First Amendment rights, even if its time, place, and manner restrictions limit the citizen's speech.

Even if a *ne exeat* consent provision creates a "right" in some sense, it is not a right to determine the child's place of residence. The term "child's place of residence" refers to the child's specific living quarters, which is why "rights of access" is defined to "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention art. 5(b). The *ne exeat* clauses vest no right to determine A.J.A.'s living

quarters; they vest at most a right to block the child's departure from Chile.

Petitioner argues that Petitioner's "right" to block A.J.A.'s departure from Chile limits Respondent's options in exercising her right to determine A.J.A.'s place of residence, and therefore he has a "shared" or "partial" right to determine residence. Petr. Br. 15. But Petitioner is guilty of a category mistake. It is false to contend that if right A can be exercised to limit the exercise of right B, then the holder of right A "shares" right B. Someone can invoke a copyright or a right of privacy to block what NBC broadcasts, but that does not mean that he enjoys a "shared" or "partial" right to broadcast over the spectrum exclusively assigned to NBC. Respondent, as the sole custodian, has the exclusive right to choose the actual place of A.J.A.'s residence. *Id.* Any separate "right" Petitioner may have to block A.J.A.'s departure from Chile, with the derivative effect that Respondent might not be able to exercise the right of residency determination in another country, does not mean that Petitioner shares the right to determine A.J.A.'s residence.

Regardless, Petitioner's contorted reading of Article 5 is of no avail to him. He has no right to veto the custodian's residency determination under the *orden de arraigo* or the Minors Law. The *orden de arraigo* grants no rights at all; it is directed to the person of the child and prohibits him from leaving the jurisdiction, with no exceptions for consent.[3] Pet.

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[3] An *orden de arraigo* is authorized by Chile's criminal code and is generally used to prevent those being prosecuted from leaving the country. *See* CÓDIGO DE PROCEDIMIENTO PENAL CHILENO art. 305 bis A (Chile).

App. 69a-70a. As to the Minors Law, the parent with visitation rights cannot veto the child's departure from Chile by withholding consent. Rather, if the visitation-rights holder objects, authorization for the child's departure "may be granted by the Family Court of the jurisdiction in which the child resides." *Id* at 62a. Thus, Article 49 grants Petitioner no power other than (1) to acquiesce in the Respondent's determination, or (2) to force Respondent to seek court permission to take the child abroad. This is a far cry from vesting a right to determine the child's place of residence in Petitioner.

These and other *ne exeat* consent clauses function no differently from consent requirements that are ubiquitous in judicial procedure. They are mechanisms that allow the courts to avoid judicial process if the proposed action does not impair any party's interests. They are not substantive rights. Article 49, for example, is similar in kind to this Court's rule permitting *amici curiae* to file briefs in pending merits cases either with "the written consent of all the parties," or with leave of the court. Sup. Ct. R. 37(3)(a). It would be a confusion of terms to say that all parties to the case thereby "determine" if an *amicus* may file its brief. Rather, it is the *amicus* (if no party objects) or the court (if any party objects) that determines whether the brief will be filed. Consent provisions simply obviate a judicial decision where no party's interests are prejudiced.

Finally, even if *arguendo* the word "determination" in the abstract could somehow be stretched to encompass consent decisions under *ne exeat* clauses, that would not make it a reasonable gloss on Article 5. Treaties "are drawn by persons

competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties." *Rocca v. Thompson*, 223 U.S. 317, 332 (1912). If the signatories had intended to remedy *ne exeat* violations, "it would have been very easy to have declared that purpose in unmistakable terms." *Id.* For example, Article 3 could easily have been written to declare removals wrongful if in breach of custody rights, or of an order or law forbidding the custodian to remove the child from the jurisdiction. Absent any common usage that *ne exeat* clauses create joint-custody rights, "no sensible draftsman would use such strange 'shorthand'" instead of addressing *ne exeat* violations directly. *Chan*, 490 U.S. at 129 n.3.

D. The Actual-Exercise Requirements Confirm That "Rights of Custody" Bear Their Ordinary Meaning.

Other Convention provisions confirm the natural reading of Article 5 limiting "rights of custody" to their ordinary meaning of rights of care of the child. Article 3 describes two elements of proof of a "wrongful removal": (1) custody rights were breached, and (2) such "rights were *actually exercised*, either jointly or alone, or would have been so exercised but for the removal or retention." Convention art. 3(b) (emphasis added). The requirement of "actual exercise" makes sense only if the custody rights at stake are rights of care. This accords with the Convention's purpose of preventing disruption of the child's actual care arrangements. By contrast, any "right conferred by [a] *ne exeat* clause is not one that [an applicant] 'actually exercise[s prior to removal],'

and it is circular to say that [the applicant] would have exercised it but for [the child's] removal, because the right itself concerns nothing but removal itself." *Croll*, 229 F.3d at 140.

Article 13 expressly confirms that custody rights are only those exercised by persons with care of the child. If the requirements of Article 3 are met, then return of the child is mandatory. Convention art. 12. But Article 13 provides certain exceptions from that mandate. As relevant here, it provides that:

> The judicial or administrative authority of the requested State *is not bound to order the return of the child if* the person, institution or other body which opposes its return establishes that –
>
> a) *the person, institution or other body having the care of the person of the child was not actually exercising the custody rights* at the time of removal or retention ...

Id. art 13. Article 13 is crystal clear that the rights of custody defined in Article 5 are those exercised by the person having the care of the child. They do not include noncustodial *ne exeat* "rights" exercised by someone like Petitioner who has only access rights rather than "care of the person of the child."

Thus, the Convention's plain meaning protects the rights to custody, within the meaning of that phrase, that are attributed to a person under the law of the Contracting State of habitual residence. Those are

rights that relate to the personal care of the child, including in particular the right to determine the child's residence. But, as the Fifth Circuit held below, "*ne exeat* rights, even when coupled with 'rights of access,' do not constitute 'rights of custody' within the meaning of the Hague Convention." Pet. App. 14a. To rule otherwise, the court concluded, "would be an impermissible judicial amendment of the Convention." *Id.*

II. The *Travaux Preparatoires* Confirm that *Ne Exeat* Clauses Are Not Custody Rights.

Even if there were any ambiguity in the text of the Convention, the *travaux preparatoires* would lay it to rest. *See Air France v. Saks*, 470 U.S. 392, 400 (1985) ("In interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation," and thus "courts frequently refer to [*travaux preparatoires*] to resolve ambiguities in the text.").

A. The Convention Does Not Define "Rights of Custody" Beyond Those Attributed by the Contracting State of Habitual Residence.

The *travaux* underscore that the Convention's return remedy extends only to rights of custody that are attributed by the law of the Contracting State of habitual residence. The authoritative Pérez-Vera Report, in discussing Article 3's wrongful-removal standard, states that the "relationships that the Convention seeks to protect"

> are based upon the existence of two facts, firstly, the existence of *rights of custody attributed by the State of the*

> *child's habitual residence*, and secondly, the actual exercise of such custody prior to the child's removal.

Pérez-Vera at 444 (emphasis added).

The first is "the juridical element," for "the Convention is intended to defend those relationships which *are already protected, at any rate by virtue of an apparent right to custody in the State of the child's habitual residence, i.e.*, by virtue of the law of the State where the child's relationships developed prior to its removal." *Id.* (emphasis added). "[T]his is a matter of custody rights" under that State's law. *Id.* The text of Article 3 discusses three sources of custody rights under the laws of Contracting States – rights arising by operation of law, by judicial or administrative decision, or by agreement – but these examples are "not exhaustive." *Id.* at 445-46.

Petitioner relies on this discussion and its call for a "'flexible interpretation of the terms used'" as support for his position, Petr. Br. 17, but ignores the critical passage. The Report, in line with Article 3's plain meaning, states that "the sources from which the custody rights which it is sought to protect derive, are all those upon which *a claim can be based within the context of the legal system concerned.*" Pérez-Vera at 446 (emphasis added). In other words, the sources of "rights to custody" protected by the Convention are only those that give rise to a claim *of custody* under the Contracting State's law. *Id.* The *ne exeat* clauses of Article 49 and the *orden de arraigo* protect custody or access rights already granted; they are not themselves the sources of custody rights under Chilean law.

The First Commission Report that accompanied the initial draft Convention is to the same effect. "[T]he existence of custodial rights must be determined in accordance with the national laws of the State where the child had his habitual residence," for "one can only talk of violation of custody, in legal terms, in the case where such custody has at least the protection of an apparently valid title." Elisa Pérez-Vera, *Report of the Special Commission* (1980), TOME III, 172-214, at 189 [hereinafter First Commission Report]. The Report further declares that Article 3, in referring to "rights of custody [attributed under] the law of the State in which the child was habitually resident," directly "requires ... that the *custody be granted under a specific legal system*." *Id.* at 190.

Indeed, the First Commission Report makes clear that the *orden de arraigo* was not within the contemplation of Article 3. The judicial order must give the custodian "proper legal title," and Article 3 "insists that such a custody order *be characterized as such under the law of the State of the child's habitual residence*." *Id.* at 191 (emphasis added). The *orden de arraigo* did not establish legal title to custody under Chilean law, and certainly not in Petitioner (instituted as it was to remedy his anticipated abduction of A.J.A.).

Thus, the *travaux preparatoires* directly refute Petitioner's claim that the Convention encompasses "rights of custody" that are not custody rights under the Contracting State's law. Rather, it is the "the legal system" of the State that "attribute[s] the custody rights," either under "the internal law of that State" or "the law which is indicated as applicable by its conflict rules." Pérez-Vera at 446-47. Far from

autonomously defining custody rights, "the Convention is not concerned with the law applicable to the custody of children." *Id.* at 435. The Convention is "of limited scope," and allows "the law of that [Contracting] State to determine" the "factual and lawful situations" protected by the Convention. First Commission Report, at 192.

Article 3 thus refers to the well-defined systems of law in every Contracting State that grant rights of custody, as that term is ordinarily understood, whether denominated custody rights or *patria potestas* or anything else. Indeed, the participating States were surveyed prior to the Convention's adoption regarding the "principles [that] govern the assigning of legal custody in your internal law." Adair Dyer, *Questionnaire and Report on International Child Abduction by One Parent*, TOME III, 9-51, at 10 [hereinafter Dyer] (Question 11). Significantly, in their detailed answers, not a single country identified *ne exeat* clauses as a source of custody rights in its jurisdiction. *Replies of the Governments to the Questionnaire*, TOME III, 61-129 [hereinafter Government Replies] (responses to Question 11). Indeed, in a separate response to Question 16, the United States characterized *ne exeat* orders simply as having "the purpose of preserving the jurisdiction of the state in the custody matter and of safeguarding the visitation rights of the other parent." *Id.* at 88.

B. The Signatories Understood Article 5 to Define "Rights of Custody" in Their Ordinary Sense.

The *travaux* also refute Petitioner's claim that Article 5 covers persons who lack custodial rights under Contracting State law, but whose access rights are protected by *ne exeat* clauses. Rather, the *travaux* make clear that Article 5 was intended to capture the ordinary meaning of "rights of custody."

The Convention participants were well aware of Jacques Foyer's 1974 Council of Europe report discussed above, which recited that even though some legal systems used terminology encompassing care of both the child's person and property, the accepted meaning of "rights of custody" referred to a complex of rights regarding care of the person of the child, including the concrete right to choose the child's residence. Foyer Report at 53-54. Excerpts of that report were annexed to the opening Conference report on international child abduction. *Id.*

This is the conception that carried forward into Article 5. As the Pérez-Vera Report states, Article 5's definition of "rights of custody" was added merely to clarify that rights to protect the child's *property* were not included, even if such rights were attributed to the custodian under domestic law:

> As regards custody rights, the Convention merely emphasizes the fact that it includes in the term "rights relating to the care of the person of the child," *leaving aside the possible ways of protecting the child's property.*

Pérez-Vera at 452 (noting that the Convention rejected the broader concept of "protection of minors" used in earlier Conventions).

Article 5 thus does not recognize freestanding residency-determination rights independent of the custodian's rights of care. Rather, the First Commission Report declares that "[f]or the requirements of the Convention, the phrase 'rights of custody' *refers only* to those rights which *involve all aspects of the care* of the child's person, leaving aside the possible mechanisms for protection with regard to his property." First Commission Report, at 194 (emphasis added). And the Pérez-Vera Report emphasizes that in Article 5 "the Convention seeks to be more precise by emphasizing, *as an example of the 'care' referred to*, the right to determine the child's place of residence." Pérez-Vera at 452 (emphasis added); *id.* at 450 (the "right to choose one's own place of residence generally forms part of the right to custody").

In summary, Article 5 did not (as Petitioner supposes) simply declare two types of independent custody rights (care rights and residence-determination rights) as a matter of Convention law and otherwise leave the term indefinite. Rather, as Articles 3 and 5 in tandem make clear, the term "rights of custody" relates to the complex of rights (whether held solely or jointly) attributed by the law of the Contracting State of the child's habitual residence that includes "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence[.]" Convention art. 5(a).

C. The Signatories Understood the "Actually Exercised" Requirement to Apply to Custody Rights in Their Ordinary Sense.

The *travaux* also demonstrate that the "actually exercised" requirements of Articles 3 and 13 apply only to custody rights in the ordinary sense. The First Commission Report states that the wrongfulness of removal arises "from the fact that [it] ignores the rights of the other parent who is also protected by law, and the fact that it has interrupted the normal exercise of that other parent's custody." First Commission Report, at 190-91. So, for judicial orders such as are at issue here, the applicant must show "the existence of a custody decision relating to the child, combined with the effective exercise of custody" in "establishing the lawful nature of custody." *Id.* "[T]he custody which is covered by the Convention is that which is actually exercised." *Id.* at 193. The exercise of custody means the exercise of rights of care: to meet the actual-exercise requirement, the applicant "must *always* take responsibility *for care of the child's person.*" *Id.* (emphasis added). The signatories clearly understood that the custody rights that had to be actually exercised under Article 3 were custody rights in their ordinary sense (not *ne exeat* "rights").

The same held true for the actual exercise clause in Article 13 (Article 12 in the preliminary draft). The First Commission Report states unequivocally:

> [T]he expression "actual custody," as in the whole of the Draft, must be interpreted in relation to the

> definition of custody rights given in Article 5. Consequently, there is an actual custody when *the custodian cares for the needs of child's person*, even, if for acceptable reasons in a concrete case, the child and the custodian do not live under the same roof.

Id. at 203. Thus, "care" of the child does not refer to the responsibilities for the child's feeding, safety, and hygiene incident to any temporary supervision (including during the exercise of access rights). It hearkens back to the "rights of care" that are the essence of custody rights under Article 5(a); the person "having care of the child," *i.e.*, legal custody, must actually exercise those custody rights to obtain the mandatory return of the child to a foreign country.

The Pérez-Vera Report sounds the same themes. It notes that the Convention "is limited to custody rights actually exercised," because its purpose is to protect the child's emotional and physical stability (*i.e.*, the child's care arrangements). Pérez-Vera at 448. Thus, under Article 3 and 13, the applicant must prove "that he actually took physical care of the child." *Id.* It is "the person who has care of the child" – *i.e.*, the person with custody rights within the meaning of the Convention – who must "actually exercise[] custody over [the child]." *Id.* at 449.

Thus, the custody rights protected are the legal rights of care of the child's person that were actually exercised. Petitioner never had rights of care, only access rights, under Chilean law. Petitioner weakly

claims that he meets the "actual exercise" test of Articles 3 and 13 because he did not abandon his claim, pointing to the suits he filed in Chile to convert his access rights into custodial rights, and in the U.S. to seek the child's return. Petr. Br. 19 n.8. But such acts do not show that Petitioner, "having the care of the person of the child," was "actually exercising the custody rights at the time of the removal or retention." Convention art. 13(a).

Nor is Petitioner aided by the clause in Article 3 that declares removal or retention wrongful if the custody rights "would have been so exercised but for the removal or retention." *Id.* art. 3(b). First, that exception is not present in Article 13. Thus, the natural reading of Articles 3 and 13 in tandem is that even if unexercised custody rights may in some circumstances make a removal wrongful, the court "is not bound to" order return of the child unless the rights were actually exercised. The remedy for an applicant with unexercised custody rights is discretionary. *See id.* art. 18 ("The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."). But even if *arguendo* the "would have been exercised" clause of Article 3(b) should be implied in so Article 13, and the articles should be read *in pari materia*, Pérez-Vera at 461, that simply means that the applicant must show that he would have exercised care of the child but for the removal, a showing Petitioner cannot make. "The Convention includes no definition of 'actual exercise' of custody, but this provision expressly refers to the care of the child." *Id.* at 460-61. The "would have been so exercised" clause covers "two types" of "hypothetical

situations": (1) where custody was exercised before being legally recognized, for in that circumstance there is comparable "disruption of normal family life after a reasonable lapse of time," and (2) where the court reassigns custody rights, but the abduction occurs before the new custodian can exercise them. *Id.* at 449. The "exercise" requirements of Articles 3 and 13 refer to rights of care, which Petitioner never had. They are not concerned with an access-rights holder's opportunity to consent to the child's removal from the jurisdiction.

D. A Proposal to Amend Article 5 to Cover Violations of *Ne Exeat* Clauses Was Rejected During Convention Negotiations.

Finally, the signatories *rejected* an attempt to expand Article 5 to cover removals of a child in violation of a *ne exeat* order protecting access rights.

The signatories were well aware of *ne exeat* orders. Informational questionnaires sent to participating governments stated that "for the purposes of this questionnaire" the term abduction would include a circumstance where "[t]he child was removed by a parent from one country to another in violation of a court order which expressly prohibited such removal." Dyer at 9. Countries were specifically asked whether "courts or administrative authorities in your country have the power to order the custodian to keep the child within your country," and to supply data on the frequency and efficacy of any such measures. *Id.* at 11. The Permanent Bureau of the Hague Conference solicited the data because abduction in violation of a court order was "a

special case" that was "the reverse of the usual child abduction case." *Id.* at 40. The Bureau did "not presently have reliable information as to the frequency and importance of the existence of such clauses and their violation on the international level." *Id.* at 41. It further noted that dealing with this "specific situation might create difficult drafting problems." *Id.*

The Governments' responses to Question 16 did not indicate a substantial international problem of *ne exeat* violations. Some countries replied that their courts and administrative agencies lacked the powers to prevent the removal of the child by a custodian; others opined that the power was rarely exercised; and none had significant data on the extent of the violations of such orders. *See, e.g.*, Government Replies at 62 (Germany), 71 (Belgium), 81 (Denmark), 103 (Israel), 108 (Japan), 114 (Netherlands), 116 (Portugal), 119 (Sweden), 127 (Turkey). A study conducted by the International Social Service identified only nine reported cases where the abduction involved violation of *ne exeat* orders, with no indication any involved orders protected access rights; the one example given involved breach of joint custody rights exercised under Greek law. *Summary of Findings on a Questionnaire Studied by International Social Service*, TOME III, 130-144, at 132, 138-39.

Indeed, when a Canadian delegate (Leal) sought to accommodate cases like Petitioner's, he proposed to *amend* Article 3 to add at the end of the phrase "in breach of rights of custody" the words "or access." *Documents de travail Nos 4 à 13*, TOME III, 261-63, at 262. Leal opined that "rights of access should be

accommodated more fully within the scope of the Convention" because they "could at times *attain almost the same level of importance as custody rights.*" *Procès-Verbal No 3*, TOME III, 263-67, at 266 (emphasis added). He gave an example where "[c]ustody is given to the mother, but the order provides that the child cannot go out of the jurisdiction without the father's consent." *Id.*

Other delegates objected to expanding the mandatory-return remedies to access-rights holders (like Petitioner), noting that Article 17 (now Article 21) dealt with access rights, and more comprehensive protection was outside the scope of this Convention. *Id. at* 266-67. Ultimately, the proposal was defeated 19-3. *Id.* at 267.

Remarkably, Petitioner attempts to convert the rejection of a proposal that would have protected his rights into an affirmation of his theory. Petr. Br. 44-45. He relies on a statement of the Dutch delegate (van Boeschoten) that Article 3 already covers the example given above, as well as an ambiguous statement by a mere observer who did not even have a vote (Eeckelaar).[1] *Id* at 44. Petitioner's argument violates the cardinal rule that individual statements of legislators in floor debates are given no weight. *Garcia v. United States*, 469 U.S. 70, 76 (1984). That rule applies even when there were "no objections" to the comments (Petr. Br. 44-45). There is no basis to establish that the remaining delegates believed those

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[1] Attendees could easily have understood Eekelaar's statement that a "possible" solution "could be found" within the terms of Article 5 as a recommendation to revise Article 5, rather than Article 3.

situations to be covered by the Convention, especially when a Canadian delegate and a U.S. delegate did not so interpret Article 3. *See* Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases,* 38 FAM. L.Q. 529, 539 n.33 (2005).

Significantly, the Chairman of the First Commission understood Article 3 not to protect *ne exeat* rights:

> [B]reach of a right simply to give or to withhold consent to changes in a child's place of residence is not to be construed as a breach of rights of custody in the sense of Article 3. A suggestion that the definition of "abduction" should be widened to cover this case was not pursued.

A.E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 546 (1981). The Pérez-Vera Report reiterates that the Convention could not agree on the difficult issue of protecting access rights, and

> [a] questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.

Pérez-Vera at 444-45.

This is exactly the substitution of rights that Petitioner seeks. Respondent "was granted daily care and control of [A.J.A.]," whereas Petitioner had been granted mere rights of "access." JA 55. Petitioner had the burden of proof, and he never proved (and could not prove) that the *orden de arraigo* and Minors Law gave him substantive custody rights within the meaning of the Convention.

III. *Ne Exeat* Provisions Protect Jurisdiction, Rather Than Create Custody Rights, and Are Outside the Scope of the Convention.

Petitioner's theory is not only unfounded in the Convention's text and drafting history, but it is also conceptually flawed. *Ne exeat* is – and always has been – a power *of the state* designed to preserve its jurisdiction over a person or property, not a source of substantive rights. Thus, violation of a *ne exeat* statute or order frustrates the state's jurisdiction, not the custody right of a private individual.

Significantly, the 1980 Hague Conference disclaimed any intent to redress the violation of foreign court orders, deeming it too controversial and unlikely to gain the wide support thought necessary. Their reluctance was prescient. The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 35 I.L.M. 1391, 1396 [hereinafter 1996 Convention], which binds signatories to recognize the jurisdiction of one another's family law courts, has only 17 signatories, and the United States and Chile are not among them. Petitioner's attempt to convert the 1980 Convention

into a jurisdictional treaty for the enforcement of foreign *ne exeat* orders and statutes should be rejected out of hand.

A. *Ne Exeat* Is a Power Exercised by the State to Preserve Its Jurisdiction.

"A writ of *ne exeat* is not in itself a remedy. It is a means to effectuate a remedy, viz., by keeping a party within the jurisdiction of the court." *Judson v. Judson*, 8 F.R.D. 336, 337 (D.D.C. 1943); *see also Gredone v. Gredone*, 361 A.2d 176,179 (D.C. 1976) (*ne exeat* "prevent[s] the frustration of a plaintiff's equitable claims by ensuring the continued physical presence of the defendant within the court's jurisdiction").

Under the common law, "every man may go out of the realm for whatever cause he pleaseth," but the king had the right to command by writ of *ne exeat regnum* that the subject not leave the realm without the king's leave. Sir William Blackstone, *Commentaries on the Laws of England* *265-66 (Wm. Draper Lewis ed. 1922). In the late sixteenth century, use of the writ was expanded to enforce private rights, *id.* at *266 n.66; *see also Elkay Steel Co. v. Collins*, 141 A.2d 212, 445-46 (Pa. 1958), and became known as *ne exeat republica* in America. *Andersen v. Andersen*, 43 N.E.2d 176, 179 (Ill. App. Ct. 1942).

Modern domestic and international *ne exeat* orders operate consistently with the writ's historical tradition – to preserve jurisdiction of the court as a means to effectuate a remedy. Commonly used in tax or criminal proceedings, *see* I.R.C. § 7402(a); *United*

States v. Denedo, 129 S. Ct. 2213 (2009), *ne exeat* statutes and orders have come to be used in family law. .Before 1980, U.S. state courts commonly issued *ne exeat* orders either as a matter of inherent equitable power or by statute. Government Replies at 90. Foreign courts and statutes likewise employ *ne exeat* provisions. *See, e.g., id.* at 77 (Canada), 104 (Israel), 125 (Czechoslovakia).

Because *ne exeat* provisions vindicate the court's jurisdiction rather than allocate custody rights, they generally operate without regard to the scope of the relationship between the non-custodial parent and the departing child. They also consistently vest the ultimate authority over removal in the court, thereby preserving the state's ability to make an independent determination based on the child's interests. In Louisiana, the parent with primary custody "shall obtain either court authorization to relocate, after a contradictory hearing, or the written consent of the other parent prior to any relocation." LA. REV. STAT. ANN. § 9:355.3. Many States follow a similar approach, usually requiring either court order or the other parent's consent. *See, e.g.*, N.J. STAT. ANN. § 9:2-2; MASS. GEN LAWS ch. 208, § 30; 750 ILL. COMP. STAT. 5/609(a); N.D. CENT. CODE § 14-09-07(1).

The purposes of these statutes are to protect a court's jurisdiction, *Jelsing v. Peterson*, 729 N.W.2d 157, 161 (N.D. 2007); *Farag v. Delawter*, 743 N.E. 2d 366, 368 (Ind. Ct. App. 2001), not to generate rights. They are "'not designed to burden unduly the custodial parent or to impede his or her decision-making authority as the primary care-taker.'" Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past*

and Present, 30 FAM. L.Q. 245, 286 (1996) (quoting *Long v. Long*, 381 N.W.2d 350, 356 (Wis. 1986)).

B. The Convention Is Not a Framework for Mutual Recognition of Family Law Court Jurisdiction.

The jurisdictional motivation claimed by Petitioner was explicitly rejected in the early stages of negotiation. As a result, the Convention is "certainly not a treaty on the recognition and enforcement of decisions on custody." Pérez-Vera at 435; First Commission Report, at 177. Ultimately, "[t]he insurmountable difficulties encountered in establishing, within the framework of the Convention, directly applicable jurisdictional rules" resulted in a Convention primarily geared to preserving the *status quo* rather than determining where custody decisions should be made. Pérez-Vera at 429. "It was decided ... to draft a Convention which would concern itself with custody *rights* rather than with custody *decisions*." Anton, *supra*, 30 INT'L & COMP. L.Q. at 542.

Sixteen years later, the jurisdictional approach was revived and explicitly adopted in the 1996 Convention. The 1996 Convention establishes the principle that jurisdiction over all "measures directed to the protection of the person or property of the child" is appropriately placed in the country of habitual residence for the child. 1996 Convention arts. 1, 5. It therefore provides a framework for determining the appropriate jurisdiction to address such measures after a "wrongful removal or retention of the child." *Id.* art 7. Thus, the 1996 Convention is designed to "supplement[] and strengthen[] the 1980

Child Abduction Convention by doing what the latter Convention was not designed to do": provide for the recognition and enforcement of custody and access orders of foreign jurisdictions. Gloria Folger DeHart, *The Relationship Between the 1980 Child Abduction Convention and the 1996 Protection Convention*, 33 N.Y.U. J. INT'L L. & POL. 83, 89-90 (2000). As the drafters of the 1980 Convention predicted, the 1996 Convention has met with resistance, attracting only 17 signatories (the 1980 Convention has 81), not including the United States and Chile. Hague Conference on Private International Law, Status Table, 1996 Convention, *available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=70.

Petitioner cannot remake the 1980 Convention into a vehicle for enforcing foreign orders, like *ne exeat* orders and statutes. Giving the 1980 Convention its natural meaning does not require this court to condone violations of such orders (although this Court may recognize that such violations are often desperate acts taken out of concern for the safety of the child or mother or out of economic duress). *See* Bruch, *supra*, 38 FAM. L.Q. at 544-45. The Convention's concern is with preserving the existing custodial relationships so as to safeguard the child, not with punishing violations of foreign court orders or statutes.

C. Article 49 of the Minors Law Does Not Create Rights of Joint Custody.

The blanket rule Petitioner espouses makes every domestic *ne exeat* law or order with a consent provision into the source of custody rights, no matter

its design or purpose. The Convention attempts no such alchemy.

It makes no sense to make every *ne exeat* order with a consent clause *ipso facto* a source of custody rights. For example, courts issue *ne exeat* orders to protect persons with mere paternity claims. *Pielage v. McConnell*, 516 F.3d 1282, 1285-86 (11th Cir. 2008). Such orders maintain jurisdiction so that the court can decide the claimant's rights; they do not grant custody rights. It is inconceivable that such a paternity claimant (who has the same "right" to determine residency as Petitioner) has custody rights under the Convention entitling him to demand the child's return to a foreign country.

Similarly, Article 49 of the Chilean Minors Law should not be interpreted contrary to its purpose. Article 49 simply requires authorizations of either parents or third parties in various circumstances to protect the child's safety and maintain Chile's protective jurisdiction over him. Pet. App. 61a. It has nothing to do with custody rights. Indeed, many of the authorizations must be given by parents (or third parties) who already have custody by court order. *Id.* Nor can the other authorizations be plausibly read as attributions of custody rights. Take, for example, the provision forbidding departure of a "natural" (illegimate) child from Chile without authorization from parents who have "voluntarily acknowledged" the child. *Id.* Chile is not thereby attributing to a person with a mere paternity or maternity claim a "right of custody" to enable him to have "a substantial say in the child's care and development," and a right to determine the "child's

primary cultural identity – the languages she speaks, the games she plays." U.S. Br. 14.

Finally, the authorization Article 49 requires of a visitation-rights holder does not create custody rights. Article 49 assumes that he has none, by definition. It is pure artifice to construe Article 49 as creating a species of joint custody, when the custody court did not grant the visitation-rights holder any right of care or any "right to determine the child's place of residence," and when he concededly has no power to determine whether the child resides in downtown Santiago or a rural Andean village. Nor, if departure is authorized by the visitation-rights holder or the court, does he have any say in where the child resides abroad.[5] Article 49 is designed to protect Petitioner's visitation rights by keeping the child in Chile absent a court order "authorizing the departure of the minor," nothing more. Pet. App. 62a. This Court should resist the dubious notion that the Convention "autonomously" recognizes rights of custody arising from laws like Article 49 that were not meant to grant them.

D. Converting *Ne Exeat* Consent Provisions Into "Rights of Custody" Subverts the Purposes of the Convention.

Returning A.J.A. to Chile would accomplish precisely what the Convention was intended to

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[5] Petitioner claims the power to affect cultural identity, language, and education by attaching residency conditions to his consent, Petr. Br. 15-16, but any such conditions would be enforceable, if at all, as a matter of contract, not Article 49.

prevent: disruption of the custodial *status quo*. Respondent has continually exercised sole custody of A.J.A. from 2003. At no time has Petitioner been granted anything other than limited visitation, and his custody petition was denied.

1. Petitioner Misstates the Convention's Aims.

Petitioner claims that his position furthers the Convention's aims. But his arguments either presuppose what he is trying to prove (that he has custody rights), misconstrue the Convention as jurisdictional, or simply make no sense. For example, Petitioner argues that construing *ne exeat* orders as "right[s] of custody" would discourage parents "from taking children across international boarders in search of a friendlier forum," Petr. Br. 23, and "will ensure that the Chilean family court ... can resolve this and any subsequent disputes that may arise," Petr. Br. 25. But the Convention's concern in that respect was abduction by persons (either joint custodians or noncustodians) who disrupt the custodial *status quo* to seek alteration of *custody rights* by a foreign court. Pérez-Vera at 444-45. Holders of *sole* custody rights (like Respondent) have no such incentive.

The Chilean jurisdiction that Petitioner seeks to preserve by obtaining an Article 12 order is jurisdiction to convert his access rights into custody rights. There is no reason the Convention would privilege access rights protected by *ne exeat* orders over those that are not; the substantive interests of child and parent are the same. *Croll*, 229 F.3d at

142-43. The Contracting States simply declined to extend the Convention to protect such rights.[6]

2. Petitioner's Theory Will Sever Existing Custodial Relationships.

Yet another critical problem with Petitoner's theory is that if Article 12 proceedings are successful against a sole custodian, there is no guarantee that custodian will be able to return with the child to the country of habitual residence. Petitioner and the United States cavalierly dismiss this concern, Petr. Br. at 26-27; U.S. Br. at 18, but the Convention cannot be read to mandate severance of the child's relationship with the lone custodial parent.

Habitual residence may be established in a foreign country even if the custodial parent is on a short-term visa. *See, e.g.*, 8 C.F.R. § 214.2(h)(8)(iii)(A), (h)(13)(iii) (3-year employment visas); § 214.2(f)(5) (student visas for duration of their course of study); Law No. 1,094, July 14, 1975 (Chile) §§ 23, 27 (one-year renewable student visas); *id.* §§ 29, 30 (temporary resident visas, given to those with "family

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[6] Petitioner's claim that this Court should not make the United States a haven for parents who want to remove their children from their country of habitual residence at the expense of persons whose only substantive rights are access rights, Petr. Br. 25, is a plea for this Court to rewrite the Convention. The U.S. enforces the Convention vigorously, within its proper limits. U.S. Dep't of State, *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction* (2009) at 6-7, *available at* http://travel.state.gov/pdf/2009HagueAbductionConventionCompliance Report.pdf.

links or interests in the country," are limited to a year and may be extended only once); *Pielage*, 516 F.3d at 1284-1286 (establishing habitual residence in the U.S. of a child born to Dutch woman with a 6-month tourist visa).

Because visas are a principal instrument of border control, countries commit the power to revoke or deny renewal of an alien's visa to the discretion of immigration officials, who may do so for virtually any reason. *Noh v. INS*, 248 F.3d 938, 941 (9th Cir. 2001); 8 U.S.C. § 1201(g); Law No. 1,094, July 14, 1975 (Chile) § 13. Immigration statutes also specify grounds for denying visas, for example, if a applicant without financial means may become a "public charge" during the intended stay. *See* 8 U.S.C. § 1182(a)(4)(A); Law No. 1,094, July 14, 1975 (Chile) § 15(4); Exec. Decree No. 597, June 14, 1984 (Chile) § 26(4). There is no guarantee that a removing parent will be able to re-enter the country to which the child is returned. The Special Commission has recognized this problem. Hague Conference on Private International Law, *Report on the Fifth Meeting of the Special Commission* ¶¶ 239-40 (2006).

Under the Respondent's reading of the Convention, the removing parent's visa problems do not negatively affect the child; he will be returned to a sole or joint custodian. But under Petitioner's interpretation, the child's existing custodial relationship will be extinguished, and he will be committed to the care of a person or institution who has never had actual custody before. This subverts the Convention's purpose, which is to maintain existing custodial care relationships because of the recognition of the importance of the primary

caregiver to the child's emotional well-being. Dyer at 21-22; Pérez-Vera at 448, *Croll*, 229 F.3d at 141. Petitioner's rejoinder that the removing parent has only herself to blame (Petr. Br. 27) misses the mark. The Convention's focus is on the child, not parental rights, *see* Convention art. 13(b), and does not contemplate putting the child in such jeopardy.

Moreover, if the parent with sole custody rights cannot accompany the child, the foreign court will have to award at least temporary custody to someone (presumably the non-custodial applicant) until custody can be awarded in the State of return. But this impermissibly involves the foreign court in the very custody determinations that the Convention sought to avoid by allowing a court to rely on a prior jurisdiction's award of custody rights. Convention art. 16; Pérez-Vera at 463 (Article 16 "seeks to prevent a decision on the merits of the right to custody being taken in the State of refuge").

Petitioner's theory, premised as it is on one eight-word phrase of a definitional term without due regard for the structure, purpose, and operation of the Convention as a whole, is not viable.

IV. The Other Canons Invoked by Petitioner Do Not Support His Theory.

The plain meaning and drafting history of the Convention make resort to other canons unnecessary, but regardless none supports the Petitioner.

A. Petitioner Presents No Evidence of Post-Ratification Conduct by the Convention's Signatories.

A treaty is "a 'contract' among nations." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 260 (1984). As with any contract, this Court may look to "the post-ratification understanding of the contracting parties" as evidence of contractual intent, *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226-27 (1996), for "their conduct generally evinces their understanding of the agreement they signed," *United States v. Stuart*, 489 U.S. 353, 369 (1989).

Petitioner invokes but misapplies this doctrine. The isolated decisions of foreign courts and selective reports of the Hague Conference's Special Commission, *see* Petr. Br. 29-42; U.S. Br. 22-29, do not constitute post-ratification conduct of signatories.

Although judicial interpretation of a treaty may be entitled to weight, *see infra*, it is not the conduct of treaty parties. *See Saks*, 470 U.S. at 403 (distinguishing between "the conduct of the parties to the [Warsaw] Convention" and "the subsequent [judicial] interpretations of the signatories"); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 546 (1991) (same); *see also Zicherman*, 516 U.S. at 227-28 (*legislation* enacted by other countries can demonstrate the "postratification conduct"). The postratification-conduct doctrine attempts to divine the parties' intention at the time of contracting by examining the subsequent conduct of the *same* party. *O'Connor v. United States*, 479 U.S. 27, 33 (1986). A court is not acting in the capacity of a sovereign

contracting party when it adjudicates a treaty dispute, and its decision does not reflect the original intent of the sovereign State of which it is a part.

Nor are the reports of the Hague Conference Special Commission evidence of the States' post-ratification conduct. Petr. Br. 29-32; U.S. Br. 27-29. The Special Commission is not a diplomatic conference empowered to review and re-negotiate the Convention, and thus is not the kind of body whose acts this Court has traditionally regarded as evidence of post-ratification conduct of the signatories. *See, e.g.*, *Eastern Airlines*, 499 U.S. at 547-50; *Saks*, 470 U.S. at 403-04. Rather, the Special Commission is merely an assembly of "experts" designated by States to study the Convention's implementation and make recommendation to state-signatories, *see* Paul Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 25 (1999), and their conclusions carry advisory weight at best. *Cf.* United Nations Human Rights Committee, *Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights* ¶¶ 447-90 (2005) (disagreeing with recommendations and interpretations by the Human Rights Committee). Their interpretations are entitled to no more weight than a congressional commission to study statutory reform.

The Special Commission report that *is* relevant is the one Petitioner conveniently omits – the Report of the First Special Commission that presented its preliminary draft of the Convention to the Fourteenth Session. First Commission Report at 172-

210; *see* Pérez-Vera at 426-27. This report illuminates the Convention's meaning because it is a part of the Convention's "negotiating and drafting history," *Zicherman*, 516 U.S. at 226, not because the Special Commission serves as an oracle on the parties' original intent.

B. Petitioner Inaccurately Construes Sister Signatories' Decisions on *Ne Exeat* Orders and Non-Removal Clauses as Uniform.

Petitioner spills much ink on decisions by foreign courts. Pet. Br. 32-42. But while this Court accords weight to the opinions of the courts of treaty signatories, *see Saks*, 470 U.S. at 404, it does not "simply defer to their judgment," *Olympic Airways v. Husain*, 540 U.S. 644, 655 n.9 (2003), but measures these opinions by the persuasive force of their reasoning. *See, e.g., Eastern Airlines*, 499 U.S. at 551. The respect due foreign courts is also bounded by other considerations. This Court has been "hesitant" to follow decisions of intermediate courts "where the respective courts of last resort . . . have yet to speak," *Olympic Airways*, 540 U.S. at 655 n.9; where foreign decisions turn on substantially different facts, *id.*; or where foreign courts' practice "is at best inconsistent," *Medellin v. Texas*, 552 U.S. 491, 128 S. Ct. 1346, 1363 n.10 (2008). Moreover, the fundamental rationale behind respect toward other signatories' courts is to promote a uniform interpretation of the Convention. *See* 42 U.S.C. § 11601(b)(3)(B); *see also Sanchez-Llamas v. Oregon*, 548 U.S. 331, 382-83 (2006) (Breyer, J., dissenting).

Here, uniformity is impossible because the foreign courts are divided.

Only seven courts (of the Convention's eighty-one signatories) of last resort have considered whether a *ne exeat* clause confers rights of custody. This alone undermines Petitioner's assertion of a consensus among the treaty's parties. Petr. Br. at 32-33.

Moreover, the highest courts that *have* spoken on the issue are divided, with the Supreme Court of Canada having *twice* concluded that the *ne exeat* order is not a right of custody under the Convention. *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (Can.); *D.S. v. V.W.*, [1996] 2 S.C.R. 108 (Can.). Therefore, this is not a case where this Court will create a rift in controlling judicial authority among the Convention's signatories; such a rift already exists.

Petitioner attempts to evade the Canadian Supreme Court's decisions by erroneously labeling them as "dicta." Petr. Br. at 38-42. But these decisions have definitively considered and rejected the non-custodial parent's claim premised on the same argument Petitioner make here – that a right to refuse consent to a child's relocation to another country constitutes a right of custody.[7] The Canadian Supreme Court's decisions are particularly instructive because their method of treaty interpretation parallels the one adopted by this Court. In *Thomson*, the Canadian Supreme Court, after examining the text, drafting history, and

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[7] Whether court decisions are holdings or dicta is immaterial in any event; this Court evaluates them based on the persuasiveness of their reasoning. *Saks*, 470 U.S. at 404; *Eastern Airlines*, 499 U.S. at 551.

purpose of the Convention (including the Dyer Report and Questionnaire, on which Petitioner places heavy reliance, Petr. Br. at 42-43), expressly rejected the contention that "the right to determine the child's place of residence" can be "divisible from the right to care for the person of the child, and [that] by virtue of a non-removal clause, this rights vests in ... the access parent." 3 S.C.R. 551 ¶ 60. The court observed that *ne exeat* orders are intended "to preserve the court's jurisdiction to make a final determination of custody" and are "not intended to be given the same level of protection by the Convention as custody." *Id.* ¶¶ 67, 69.

Accordingly, *Thomson* concluded that a Scottish court's *ne exeat* order did not transform the father's access rights into "custody rights" requiring the child's return to Scotland under the Convention. *Id.* ¶ 68. Although the Canadian Supreme Court ultimately ordered the return on alternative grounds, *id.*, that does not transform the Court's considered rejection of the first ground into dicta. *See R.R. Cos. v. Schutte*, 103 U.S. 118, 142 (1880).

The Canadian Supreme Court dispelled any doubts about the validity of *Thomson* two years later, in *D.S. v. V.W.* There, the Canadian Supreme Court explicitly rejected the non-custodial parent's argument (and the holding of the lower court) that her "right to oppose the child's removal" from Maryland to Quebec "was equivalent to rights of custody within the meaning of [the Convention.]" [1996] 2 S.C.R. 108 ¶ 42. The Court explained that this construction violates the Convention's central purpose:

> By confusing, for all practical purposes, the concepts of custody rights and access rights, this interpretation amounts to saying that any removal of a child without the consent of the parent having access rights could set in motion the mandatory return procedure provided for in the [Convention] and thus indirectly afford the same protection to access rights and is afforded to custody rights.

Id. ¶ 43. This reasoned conclusion – which was not dicta since return was denied – is equally fatal to Petitioner's argument here.[8]

By contrast, Petitioner conveniently overlooks the fact that the decision by the U.K. House of Lords in *In Re D*, [2007] 1 A.C. 619 (H.L. 2006), is self-avowed dicta. *See* Petr. Br. at 33-34. Every opinion in that case acknowledged that a *ne exeat* order was not at issue, and the House of Lords accordingly concluded that the requesting parent had no custody rights. 1 A.C. 619 ¶ 9 (Lord Hope); ¶ 40 (Lady Hale); ¶¶ 72-73 (Lord Carswell); ¶ 81 (Lord Brown). Although some members of the House of Lords proceeded to opine on whether *ne exeat* orders could create such a right of custody, that was not at issue in that case. As Lord Carswell observed, commenting on his colleagues' advisory opinions, "I should prefer to reserve my

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[8] Contrary to Petitioner's claim, *see* Petr. Br. at 39-40, *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (Can.), is inapposite because it concerned only the proper scope of access rights in light of the best interests of the child. *Id.* ¶ 45.

opinion on that issue until it falls directly for decision in a case before the House." *Id.* ¶ 74.

Petitioner likewise fails to mention that many of the cases on which he relies turn on the rights that are different from the right of *ne exeat*. These cases (including the decisions by the highest courts in Germany and Ireland) involved instead joint parental rights that conferred upon the non-custodial parent additional rights and duties with respect to the child's care and upbringing. *See* Bundesverfassungsgericht [BVerfG] [Fed. Const'l. Ct.] July 18, 1997, 2 BvR 1126/97, ¶¶ 13-15 (F.R.G.) (the non-custodial parent had a right to jointly decide questions relating to health, education, the child's right to marry, and the child's ability to join the military); *M.S.H. v. L.H.*, [2000] 3 I.R. 390 (Ir.) (the parents had joint "rights of parental responsibility," defined as "all the rights, duties, powers, responsibilities and authority which, by law, a parent of a child has in relation to a child and his property"); *C. v. C.*, [1989] 1 W.L.R. 654 (Eng. C.A.) (the parents were joint guardians of the child); *see also Thomson*, 3 S.C.R. 551 ¶ 63 (distinguishing *C. v. C.* as the case where "the parents were joint guardians"). This Court hesitates to follow the opinions of other signatories' courts where these cases involve "substantial factual distinctions." *Olympic Airways*, 540 U.S. at 655 n.9.

In yet another country, France, as Petitioner grudgingly acknowledges, Petr. Br. 37-38, the courts are divided. *Compare Ministere Public v. Mme. Y., Tribunal de grande instance* [T.G.I.][ordinary court of original jurisdiction] Périgueux, Mar. 17, 1992, D.S. Jur. 1992 (Fr.) (*ne exeat* provision does not create rights of custody), *with Ministre Public c. MB, Cour*

d'appel [CA] [regional court of appeal] Aix-en-Provence, Mar. 23, 1989, *reprinted in* 79 Rev. crit. 529 (1990) (Fr.) (*ne exeat* order creates rights of custody). Petitioner understandably prefers the earlier decision to the later one, but that is not a principled distinction.

Finally, another decision on which Petitioner relies, Petr. Br. at 36 – the opinion by the Family Court of Australia in *In Re Marriage of J.R. and M.R.*, (1991) App. No. 52 (Fam.) (Austl.) – openly expressed misgivings about its holding that *ne exeat* clauses create custody rights under the Convention, which was "a quantum leap from what had hitherto been the understood interpretation of that term." *Id.* The court accordingly suggested that "a later Full Court of this Court may on a fuller analysis of the issue wish to consider the matter further." *Id.*

Petitioner's claim that signatory countries have overwhelmingly decided the question presented is thus patently overstated. The Court should not be swayed by self-serving selections from foreign case-law. *See Olympic Airways*, 540 U.S. at 655 n.9; *Eastern Airlines*, 499 U.S. at 551.

C. The State Department's Interpretation Contradicts the Executive's Prior Position and Is Not Entitled to Deference.

The United States urges this Court to defer to its interpretation of the Convention, U.S. Br. 21-22, but deference is inappropriate in this case. While "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty," *El Al Israel Airlines, Ltd. v.*

Tsui Yuan Tseng, 525 U.S. 155, 168 (1999), the Executive's views on treaty obligations are "not conclusive," *Sumitomo*, 457 U.S. at 184; *see also Sanchez-Llamas*, 548 U.S. at 378 (Breyer, J., dissenting) (same). Because courts have an obligation to "interpret treaties for themselves," *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961), the Executive's construction of a treaty is entitled to weight only when it is "faithful to the Convention's text, purpose, and overall structure," *El Al Israel Airlines*, 525 U.S. at 168-69.

Accordingly, this Court has accorded respect to the Executive's position when that interpretation was "in conformity with [the treaty's] plain language," *Sumitomo*, 457 U.S. at 185 n.10, or consonant with the treaty's "basic purpose," *Kolovrat*, 366 U.S. at 193. Conversely, when the government's position was contrary to the text, drafting history, or settled principles of treaty interpretation, this Court consistently declined to adopt the Executive's construction. *See, e.g.*, *Chan*, 490 U.S. at 133-34; *United States v. Louisiana*, 363 U.S. 1, 62-64 (1960); *Louisiana Boundary Case*, 394 U.S. 11, 40-47, 60-63 (1969); *Perkins v. Elg*, 307 U.S. 325, 328, 337-42, 347-49 (1939).

This Court pays attention to the Executive's views as to the meaning of the treaty provisions because the Executive is "charged with their negotiation and enforcement." *Sumitomo*, 457 U.S. at 184-85; *Kolovrat*, 366 U.S. at 194. Here, however, the government offers no special perspective rooted in the State Department's participation in the Convention's drafting and negotiation. *Cf. Sumitomo*, 457 U.S. at 181 n.6. Indeed, the State Department's views at the

time of the Convention's adoption and ratification support Respondent. *See, e.g.*, Letter of Submittal by the Secretary of State to the President, Oct. 4, 1985, *in* 51 Fed. Reg. at 10,496-97 ("[t]he remedies for breach of the 'access rights' of the non-custodial parent do not include the return remedy" and the Convention seeks to ensure that the non-custodial parent does not "retain [the child] beyond the end of the visitation period"); *see also Croll*, 229 F.3d at 142; Bruch, *supra*, 38 FAM. L.Q. at 539-40 n. 33 (discussing views of members of the U.S. delegation). In its legal analysis of the Convention submitted to the Senate to facilitate ratification, the State Department emphasized that custody rights under the Convention involve "physical custody of a child," 51 Fed. Reg. at 10,505-06, and are exercised by "the person who has care of the child," *id.* at 10,507. This Court accords no deference to the Executive when its views on a treaty provision manifestly shift over time.[9] *See Clark v. Allen*, 331 U.S. 503, 513 (1947); *Perkins*, 307 U.S. at 346-49.

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[9] Nor does the U.S. here muster the diplomatic communications, official statements, or inter-agency letters on which this Court has traditionally relied when deciding whether to defer to the Executive. *See Sumitomo*, 457 U.S. at 184 nn.9, 10; *Kolovrat*, 366 U.S. at 194-95 & n.12. It offers nothing but this *amicus* brief, relying on *Auer v. Robbins*, 519 U.S. 452 (1997). U.S. Br. at 21 n.13. Not only did *Auer* involve matters of policy discretion, which is subject to change over time (unlike the intent of contracting parties), but the *Auer* Court deferred to an agency's legal brief because the agency was merely clarifying ambiguities in an existing regulation. 519 U.S. at 461-63.

D. Petitioner Misconstrues this Court's Canon of Liberal Construction of Treaties.

As a last resort, Petitioner invokes this Court's observation that treaties should be construed "liberally." Pet. Br. at 14 (quoting *Stuart*, 489 U.S. at 368). But this canon does not require a more expansive interpretation where a narrower construction is more faithful to the treaty's text, negotiating history, and the parties' intent. *Eastern Airlines*, 499 U.S. at 535-49; *Saks*, 470 U.S. at 398-404; *United States v. Miranda*, 41 U.S. 153, 159 (1842); *see Stuart*, 489 U.S. at 365-66; *id.* at 370 (Kennedy, J., concurring in part and concurring in the judgment) (same); *id.* at 371 (Scalia, J., concurring in the judgment) (same). It would be particularly inappropriate to interpret "rights of custody" broadly to give return remedies to access-rights holders who were clearly denied that remedy. Given that the text of the Convention and the *travaux* decisively contradict Petitioner's claim, he cannot circumvent them by a misplaced reliance on the principle of liberal construction.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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TIMOTHY MARK CAMERON ABBOTT,

Petitioner,

v.

JACQUELYN VAYE ABBOTT,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONER

With the dismissive phrase "[r]espondent and A.J.A. relocated to Texas" (Resp. Br. 8), respondent Jacquelyn Abbott backhandedly acknowledges the dispositive fact in this case: that just as the Chilean courts were about to consider petitioner Timothy Abbott's petition to expand his parental rights, Mrs. Abbott abducted the couple's son from Chile in violation of Mr. Abbott's right to require that his son either remain resident in Chile or live in another country only under conditions to which he agreed. Having abducted A.J.A. to her own home in Texas – where A.J.A. had never lived – Mrs. Abbott then instituted state court proceedings to negate the rights attributed to Mr. Abbott by Chilean law.

This frequently recurring factual scenario – in which one parent abducts a child to another nation in violation of a *ne exeat* order and seeks to nullify the jurisdiction of the courts of the country of habitual residence – falls squarely within the return remedy of the Hague Convention on the Civil Aspects of International Child Abduction. The Convention's foundational premise is that one parent should not be able to defeat the other parent's rights of custody in the country of habitual residence by taking the law into his or her own hands – that is, by abducting their child to another country. The Convention provides a return remedy to ensure that such disputes are resolved by the courts in the child's country of habitual residence – an approach that the Convention's signatories have concluded best serves the interests of children. Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ("Pérez-Vera Report"), *in*

ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III ("TOME III"), at 426, 429-32 (1982); Preamble (Pet. App. 27a).

Mrs. Abbott's contention that Chilean law granted Mr. Abbott a mere "right of access" rather than a "right of custody" makes no sense, and it is contrary to the Convention's text, purposes, and drafting history. A *ne exeat* right does not provide for "access" to the child – it has nothing directly to do with visitation rights – but instead confers a right to keep the child within the country. The function of a *ne exeat* right thus precisely corresponds to the purposes of the Convention.

Moreover, adopting Mrs. Abbott's position would require this Court to reject the straightforward position of the Central Authorities charged with ensuring the signatories' compliance with obligations under the Convention. Both the U.S. State Department and the Chilean Corporation of Judicial Assistance agree that the *ne exeat* right possessed by Mr. Abbott is a "right of custody" triggering the return remedy. That understanding is consistent with both the drafting history of the Convention and the holding of *every* court decision issued by other Convention signatories, save the single French trial court ruling on which Mrs. Abbott relies.

Mrs. Abbott's remaining arguments are merely unpersuasive attacks on the Hague Convention itself. She objects to construing it as a "vehicle for enforcing court orders." Resp. Br. 42. And she claims that enforcing the Convention would separate a child from an abducting parent who is unable to return to the

country of habitual residence. But those arguments would equally immunize even abductions in violation of court orders granting the left-behind parent complete care and control of the child. Neither argument justifies her attempt to render the Convention an empty vessel.

The judgment of the court of appeals should accordingly be reversed.

I. *Ne Exeat* Rights Easily Fall Within The Broad Category Of "Rights Of Custody" Under The Convention

The Convention's return remedy is triggered when a parent removes a child to another country in violation of the left-behind parent's rights of "custody." Art. 3 (Pet. App. 28a). By contrast, when a child is removed in violation of the left-behind parent's rights of "access," the left-behind parent may only seek the assistance of the Central Authorities. Art. 21 (Pet. App. 35a-36a). Petitioner's opening brief and the brief of the United States established that Mr. Abbott holds a "right of custody," not a mere "right of access." Respondent's arguments to the contrary are unpersuasive.

A. A *Ne Exeat* Right Constitutes A "Right of Custody" – Specifically, The Right To Determine The Residence Of The Child

Mrs. Abbott principally argues that Mr. Abbott's *ne exeat* right is merely a right of access because Chilean law granted Mrs. Abbott daily care and control of A.J.A., but limited Mr. Abbott to visitation and, at most, a "veto" over Mrs. Abbott's departure

from Chile with A.J.A. Resp. Br. 20-24. That assertion misapprehends the meaning of a "right of custody" under the Convention and the nature of a *ne exeat* right.

Article 5(a) of the Convention defines "rights of custody" as "includ[ing] rights relating to the care of the person of the child, and, in particular, the right to determine the child's place of residence." Pet. App. 28a. Mr. Abbott's *ne exeat* right gives him precisely that power. He has the shared right to make any determinations regarding where his son will live. Most obviously, he can insist that his son remain in Chile. If he instead decides to authorize Mrs. Abbott to take A.J.A. out of Chile, he can do so with reasonable conditions, including conditions on the location within a particular country in which A.J.A. lives. In either scenario, Mr. Abbott's *ne exeat* right gives him a significant say in the culture in which his child is raised, the languages that his child will speak, or the kinds of schools that he will attend. *See* Pet. Br. 15-16.[1]

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[1] Mrs. Abbott's argument that Mr. Abbott holds no rights at all under the Chilean court order (the orden de arraigo) is irrelevant: he clearly does hold a *ne exeat* right granted by a Chilean statute, rendering the court order surplusage. Further, the lower courts decided this case on the premise that the court order and statute impose indistinguishable *ne exeat* rights. Pet. App. 6a, 20a n.3. Mrs. Abbott accepted that premise in the court of appeals, *see* Resp. C.A. Br. 9, and affirmatively embraced it in the brief in opposition, *see* BIO 5 (order "prohibited either parent from removing the child from Chile without the other parent's consent"). That is furthermore the

But whether or not regarded as the right to determine the place of the child's "residence," a *ne exeat* right constitutes a "right of custody." As Mr. Abbott's opening brief recounts (and Mrs. Abbott fails to address), the Convention's drafters understood from the outset that the definition of "rights of custody" would encompass a *ne exeat* right. *See* Pet. Br. 42-43. Mrs. Abbott offers literally no support at all for her sweeping statement that "at the time of the Convention, . . . *not a single* Contracting State had identified a *ne exeat* clause as the source of custody rights," Resp. Br. 14, but in any event, the opening questionnaire distributed to potential signatory nations identified the violation of a *ne exeat* right as one of five examples of a wrongful "abduction." The terminology of a "right of custody" was first adopted by the formal report of the 1979 Special Commission charged with the initial drafting of the Convention. That report expressly adopted those cited examples of "abductions" as falling within the Convention, and importantly not only described them as embodying violations of a "custodial order" but also explained that the Convention would cover

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better reading of the court's ruling, which merely imposes a "*ne exeat*" order, a term of art that (as the citations throughout the parties' briefs reflect) is understood to permit consent by one parent. Mrs. Abbott's new reversal of position asks this Court to assume that the Chilean court would illogically override a decision by Mr. Abbott to *permit* Mrs. Abbott to leave Chile with A.J.A.

such a "removal of a child" that occurs "in breach of custody." TOME III, at 183, ¶ 37.[2]

Mrs. Abbott's contrary argument that the "place of residence" is the child's "residential address," Resp. Br. 20, and does not also refer to the child's country of habitual residence, is unpersuasive. There is no textual basis for her narrower reading, and the term "right of custody" is more naturally read to "correspond[] with the use of habitual residence as the connecting factor employed by the Convention." PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 75-76 n.191 (1999). It would be passing strange for a convention whose operation hinges on a child's country of residence to be concerned instead with the child's street address. After all, the Convention comes into play when a child is abducted from, for example, Athens, Georgia to Athens, Greece; the Convention would not be triggered if a parent moves *within* Athens, Georgia or even to Athens, Ohio. Indeed, Mrs. Abbott seems to make that very point: "Article 5 refers to the right to determine the child's residence as a 'particular' right of care, singled out because it is generally abridged by the removal of children to foreign countries." Resp. Br. 19.

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[2] The Special Commission expressed doubt about only one of the five categories, which is not at issue here: the entry of a custody order only *after* the abduction. TOME III, at 183.

Mrs. Abbott also attempts to support her argument that the phrase "place of residence" refers narrowly to the child's physical home rather than his country of habitual residence by pointing to Article 5(b)'s definition of "rights of access." *See* Resp. Br. 21-22. Mrs. Abbott asserts that the Convention's example of a right of access – the "right to take a child for a limited period of time to a place other than the child's habitual residence," Pet. App. 28a – refers to the home, and asserts that the parallel phrase "residence" in Article 5(a) must have the same meaning. But that argument simply assumes its own conclusion – *i.e.*, that Article 5(b) refers only to a right to take the child away from the home. In fact, the *travaux préparatoires* explain that the drafters actually included that illustration in the definition precisely in order "to emphasize that such a notion also extended to *the right to take the child abroad*, such a right being, within the access right, a manifestation most dreaded by the rightful custodian." Special Commission Report, TOME III, at 195 (emphasis added).[3]

Mrs. Abbott's defense of the ruling below fails in any event because the Convention defines "right of custody" capaciously, and includes the power to

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[3] The Pérez-Vera Report subsequently adopted the same view, incorporating the Special Commission report and explaining that the example was included "to emphasize that access rights extend also to what is called 'residential access', that aspect of access rights about which the person who has custody of the child is particularly apprehensive." Pérez-Vera Report, at 452.

determine the child's place of residence only as a subset of that broader right. The Convention's definition of custody thus "*include[s]*" – but is not limited to – that example.[4] The drafters agreed that the definition should "protect *all* the ways in which custody of children can be exercised," including novel joint arrangements, so that the Convention applied to as many cases as possible. Pérez-Vera Report, at 447 (emphasis in original). As a matter of interpretation, this Court has repeatedly made clear that treaties should be "construed more liberally than private agreements." *Air France v. Saks*, 470 U.S. 392, 396 (1985) (internal quotations omitted). Thus, whether or not regarded as the right to determine the place of the child's "residence," a *ne exeat* right constitutes a "right of custody" under the Convention.[5]

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[4] Mrs. Abbott would strain the text to read "include" as meaning "is." But the only two examples she gives of that usage are easily distinguished. Both involve a term defined to "include any" member of some broad category that has diverse members – *i.e.*, "any employee" and "any process." In that limited context, "include any" signifies that the term includes every member of the broad category. *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995) (when "employee" is defined to "include any employee," it encompasses all forms of employees); *Snider v. All States Administrators, Inc.*, 414 U.S. 685, 686 (1974) (when "printing" is defined to "include any process capable of producing a clear black image on white paper," it encompasses all such processes).

[5] Article 5(a) as originally drafted more narrowly provided that "rights of custody *are* rights relating to the care of the child and, in particular, the right to determine the child's place of residence" (emphasis added). But the drafters changed the text

B. A *Ne Exeat* Right Is Not A Mere "Right of Access"

The Hague Convention divides "rights" relating to the child into two categories: those of "custody" (discussed above) and those of "access." Mrs. Abbott contends that a *ne exeat* right constitutes a mere "right of access," which does not give rise to the return remedy. That argument lacks merit. Precisely because a *ne exeat* right does not fall within the category of a "right of access," it *ipso facto* constitutes a "right of custody." For the Convention recognizes only those two categories. Nothing in either the text or history of the Convention indicates that the drafters would have contemplated a third category of free-floating parental rights relevant to the subject matter of the Convention that are neither "rights of custody" nor "rights of access."

Indeed, because a *ne exeat* right cannot be characterized as a "right of access," if this Court were to affirm the judgment below, many left-behind parents holding *ne exeat* rights would be left in the anomalous position of having *no* remedy at all under the Convention for a violation of that right – not even the more limited remedy available for access rights. That cannot have been the Convention's intention.

The Convention defines "rights of access" to include "the right to take the child for a limited

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to provide more broadly that "rights of custody *shall include* rights relating to the care of the person of the child." *Procès-verbal No. 14*, TOME III, at 344.

period of time to a place other than the child's habitual residence." Art. 5(b) (Pet. App. 28a). "Rights of access" thus involve the right to spend time with the child – that is, visitation rights. For example, in discussing whether to extend the return remedy to rights of access, the Canadian delegate cited the example of a father with "extremely limited rights of access (*e.g.* two hours each Saturday afternoon)." *Procès-verbal No. 3*, TOME III, at 266. In turn, the U.S. legislation implementing the Convention defines "rights of access" as "visitation rights." Pet. App. 47a-48a (42 U.S.C. § 11602(7)).

Contrary to Mrs. Abbott's submission, a *ne exeat* right – which does not provide for visitation – does not give the parent "access." Nor can the *ne exeat* right be dismissed as merely a tool to facilitate access to the child; it no more enables visitation than it enables direct care and control. The *ne exeat* right instead allows the parent holding the right to share in the decision whether the child will leave the country, as well as a variety of other substantive rights. *See supra* Part I.

Nor would it be consistent with the Convention's purposes to trivialize a *ne exeat* right as a mere "right of access." A "right of custody" is necessarily disrupted by the child's abduction and can only be restored through the child's return to the country of habitual residence. As discussed, a *ne exeat* right directly implicates those concerns. By contrast, rights of access – *i.e.*, visitation rights – can be exercised even if the child is removed to another country. Further, when the abducting parent does no more than obstruct the often-brief period guaranteed

by a visitation right, it is understandable that the Convention's drafters elected not to automatically impose the remedy of return but instead to adopt the more limited right to request assistance under Article 21.[6]

C. The State Department's Position Is Entitled To Deference

To the extent there remains any ambiguity regarding whether Mrs. Abbott's abduction of A.J.A. was "wrongful," the considered interpretation of the State Department, which is the entity charged under the Convention with ensuring that the United States complies with its treaty obligations, Exec. Order No. 12,648, 53 Fed. Reg. 30,637 (Aug. 15, 1988), should resolve it. As the brief of the United States explains, the government has consistently understood *ne exeat* rights to constitute rights of custody under the Convention.

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[6] Mrs. Abbott's assertion that in the district court Mr. Abbott "conceded . . . that he had only been granted 'access,'" Resp. Br. 9, is a significant misstatement. The documents she cites say precisely the opposite. The complaint states: "[A.J.A.'s] removal was in breach of 'rights of custody'" and "[t]he rights of custody mentioned above were being actually exercised at the time of [A.J.A.'s] removal." J.A. 53. Mr. Abbott's accompanying factual affidavit notes that he has been granted rights of "access" – *i.e.*, his visitation right, J.A. 55 – but explains that Mrs. Abbott's abduction of A.J.A. violated Mr. Abbott's *distinct* rights under "a Chilean statute and . . . a *ne exeat* order that had been entered by the Family Court." J.A. 56.

This view is entitled to substantial deference. As this Court has put it, absent extraordinary circumstances, the meaning given treaties "by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006) (quoting *Kolvarat v. Oregon*, 366 U.S. 187, 194 (1961)). *See also El Al Israel Airlines v. Tseng*, 525 U.S. 155, 168 (1999) (adopting government's position when text of treaty open to "divergent interpretation"). Here, the State Department not only implements the Convention, but was actively involved in its drafting. *Members of the First Commission*, TOME III, at 254. Indeed, the State Department's Peter Pfund, who was the head of the U.S. delegation at the 1980 Diplomatic Conference, served as Chairman of the 1993 Special Commission meeting.[7] *Members of the First Commission*, TOME III, at 254; *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, ¶ 3 (1993).

The cases Mrs. Abbott cites to argue against deference are easily distinguishable. Those cases involved treaty interpretations that were either flatly contradicted by the text or inconsistent with the government's previously expressed views. *See, e.g.*,

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[7] Notably, the 1993 Special Commission report reflected the consensus among the delegates that a *ne exeat* right is a right of custody, as it noted that the French trial court decision on which Mrs. Abbott relies garnered no support. *See* Pet. Br. 31-32.

Chan v. Korean Air Lines, 490 U.S. 122, 133-34 (1989) (refusing to adopt government's position that clear text and structure of Warsaw Convention limiting airline liability was "drafting error"); *Perkins v. Elg*, 307 U.S. 325, 337-42, 347-49 (1939) (refusing to adopt Attorney General's position that was contrary to "repeated rulings of the Department of State" over more than fifty years).

Mrs. Abbott's further contention that the United States has in fact changed its interpretation, *see* Resp. Br. 58-59, misstates the relevant history. As noted, and as the brief of the United States explains, U.S. Br. 21 n.13, the government's position has never wavered. The statement cited by Mrs. Abbott merely recognizes the uncontroversial point that a breach of access rights does not trigger the return remedy.[8]

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[8] The contemporaneously held views of the United States stand in marked contrast to the *amicus* submission of just two (of fifty-one) delegates of their nearly thirty-year-old "recollections." That submission does not compare to the official meeting minutes that this Court considered persuasive in *Air France v. Saks*, 470 U.S. 392, 401-02 (1985). It also bears noting that one of the two delegates, Mr. Savolainen, in 1997 wrote a law review article taking precisely the opposite position. 66 NORDIC J. INT'L L. 101, 161 (1997) (deeming "undoubtedly correct" a case ordering the return of a child to the United States based on a *ne exeat* right).

D. Petitioner's Position Is Most Consistent With The Decisions Of Courts In Other Contracting States, Which Are Due Respect

Petitioner's opening brief both demonstrated that the judgment below is contrary to the overwhelming weight of judicial authority from other Convention signatories and established that this resolution of the very question now before this Court is entitled to considerable respect. The decisions of our sister signatories logically take on particular significance when, as here, Congress in subscribing to the treaty explicitly emphasizes the need for its uniform interpretation. Pet. App. 47a (42 U.S.C. § 11601(b)(3)(B)). Mrs. Abbott's contrary argument that the decisions of foreign courts should be ignored misapprehends one decision she cites, *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 227-28 (1996), which in fact relies on just such a ruling as relevant postratification conduct. *See id.* at 228 (citing decision by Canadian court). *See also Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) ("We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties.").

It is therefore significant that every court of another sovereign to decide the question presented by this case – with the lone exception of a French trial court, *see* Resp. Br. 56-57 – has concluded that a *ne exeat* right is a right of custody under the Convention. Though Mrs. Abbott attempts to articulate various distinctions regarding some of

those rulings, she fails to address the holdings of five foreign courts.[9] Nor does she dispute that *ne exeat* rights can confer "rights of custody" in all twenty-seven member countries of the European Union. Pet. Br. 21 n.10.

Respondent chastises petitioner for purportedly "overlook[ing]" the fact that there was no *ne exeat* right at issue in *In re D (A Child)*, (2007) 1 A.C. 619 (H.L. 2006), *compare* Resp. Br. 55 *with* Pet. Br. 33-34, but she herself overlooks the House of Lords' conclusion that it is well-settled that a *ne exeat* right is a "right of custody." Pet. Br. 33-34. And although she attempts to distinguish other cases on the ground that the left-behind parents had other rights in addition to the *ne exeat* right, those cases nonetheless hinged on the *ne exeat* right. *See, e.g.*, *C v. C*, (1989) 1 W.L.R. 654 (Eng. C.A.) (although parents were joint guardians, guardianship involves the right to care for the child's property; father's *ne exeat* right was the only "right of custody" at issue); Bundesverfassungsgericht [BVerfG] [Fed. Const'l Ct. of Germany] July 18, 1997, 2 BvR 1126/97 (F.R.G.) ¶ 5 (affirming lower court order requiring child's return, which it described as holding that "[e]ven a parent who only has the right to oppose the removal of the child to another country also has a custody

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[9] *See Sonderup v. Tondelli* 2000 (1) SA 1171 (CC) (S. Afr.); CA 5271/92 *Foxman v. Foxman* [1992] IsrSC; Oberster Gerichtshof [OGH] [Supreme Ct.] May 2, 1992, 2Ob596/91 (Austria); *AJ v. FJ* [2005] CSIH 36 (Scot.); *Gross v. Boda* (1995) 1 NZLR 569 (C.A. Wellington) (N.Z.).

right within the meaning of the Hague Child Abduction Convention").[10]

Beyond the lone French trial court ruling, Mrs. Abbott's search for authority affirmatively supporting her position rests entirely on dicta in *Thomson v. Thomson*, [1997] 3 S.C.R. 551 (Can.), and *D.S. v. V.W*, [1996] 2 S.C.R. 108 (Can.). Resp. Br. 53-55. In *D.S. v. V.W.*, however, there was *no ne exeat right at issue.* Instead, the Canadian Supreme Court determined that a parent's theoretical right to go to court to oppose a child's removal did not confer rights of custody under the Convention – the same conclusion reached by the House of Lords in *In re D*, (2007) 1 A.C. 619, ¶ 37 (H.L. 2006).

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[10] *Amici* Eleven Law Professors similarly distinguish the South African decision, *Sonderup v. Tondelli* 2001 (1) SA 1171 (CC) (S. Afr.), as involving a "contingent custody transfer." Law Prof. Br. 23. Here too, however, it is clear that the court's decision rested on the father's *ne exeat* right, as its return order was conditioned on the father's agreement not to enforce a court order that, if violated, transferred custody to the father. *Amici* also inexplicably quarrel with the Israeli decision, Law Prof. Br. 24-25, CA 5271/02 *Foxman v. Foxman* [1992] IsrSC, which specifically held that "every case of removing children from one country to another without the consent of the parent who had a right to give or to not give consent would be an abduction."

II. Mrs. Abbott's Remaining Contentions Lack Merit

A. Mrs. Abbott's Arguments That The Phrase "Rights Of Custody" Should Be Read To Exclude *Ne Exeat* Rights Misconstrue The Text

Mrs. Abbott attempts to locate support for her anomalous position in various provisions of the Convention. None in fact supports the judgment below.

First, Mrs. Abbott contends that "custody" embodies a "complex" of rights. Resp. Br. 18-20. But this is a *non sequitur*. Though the term "custody" can encompass an array of rights, that fact does nothing to refute the fact that a *ne exeat* right is among them. Certainly, no inference arises from the use of the plural "*rights* of custody." The equally authoritative French-language version of Article 5(a) refers only in the singular to a "right of custody" ("*le droit de garde*"). And in any event, a parent holding a *ne exeat* right has a variety of additional substantive rights. Pet. Br. 15-16.[11]

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[11] To the extent Mrs. Abbott is suggesting that a parent must possess the entire "complex" in order to have a "right of custody," that is obviously wrong. The definition of "rights of custody" itself specifies that a single power – the ability to determine the child's place of residence – is, standing alone, a right of custody. Art. 5(a) (Pet. App. 28a). Also, as noted, the Convention contemplates joint custody arrangements, under which various rights may be divided among the parents. The drafters further anticipated that the rights would be divided

Second, Mrs. Abbott contends that Mr. Abbott possesses no "right" at all, but instead a "veto." But Mrs. Abbott never even attempts to justify why the signatories to the Convention would have intended her narrow conception of a "right," which is just one among many. As the domestic and foreign authorities cited in the parties' briefs illustrate, it is common to refer to a *ne exeat* provision as conferring a "right." The court of appeals decision on which Mrs. Abbott relies understood it as such. *See, e.g.*, Pet. App. 1a ("This case requires us to determine whether *ne exeat* rights constitute 'rights of custody' within the meaning of the Hague Convention."); *id.* 14a ("*ne exeat* rights . . . do not constitute 'rights of custody' within the meaning of the Hague Convention"). Indeed, she has done so herself throughout the case. *See, e.g.*, BIO 23 ("[e]ven if *ne exeat* rights were at issue here"); *id.* 24 ("even if arguendo a *ne exeat* right sometimes operates as a custodial right . . . the exercise of *ne exeat* rights

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among different parties when "the right to care for the person of a child was vested in one person, and the right to determine the child's place of residence in another." *Procès-verbal No. 4*, TOME III, at 271. When, following the Chairman's suggestion, the drafters returned to this scenario, the First Secretary of the Permanent Bureau (Adair Dyer) explained that there was no need to modify the text of Article 5, as "the existing definition of custody rights embraced the situation where rights of custody and the right to determine a child's place of residence were vested in different persons." *Procès-verbal No. 14*, TOME III, at 344. No one disagreed. *Id.*

would constitute the exercise of custodial rights at the time of removal only in rare circumstances").

Further, as discussed above, what Mrs. Abbott characterizes as a "veto" is in fact the power to ensure that A.J.A. is not taken from the country without Mr. Abbott's permission. That is a central concern of the Convention, and it defies common sense to believe that the text intends such a narrow conception of a "right."

Mrs. Abbott argues to the contrary that two parties cannot "share" a right if one may only reject the choices of the other. But that is an argument that the power is not "shared," not that is not a "right." Rights are shared all the time, a fact that simply means that they are not absolute. Mrs. Abbott has the right to determine that A.J.A. will reside outside Chile, so long as Mr. Abbott agrees. Mr. Abbott has the corresponding right to ensure that A.J.A. remains in the country. Such a purely negative power is still a right. *See, e.g., Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278-81 (1990) (assuming a due process right to refuse life-sustaining medical treatment); *see also Georgia v. Randolph*, 547 U.S. 103, 106 (2006) (co-occupant's refusal to permit entry into home, despite consent of other co-occupant, makes warrantless search unreasonable as to him); *United States v. Bajakajian*, 524 U.S. 321 (1998) (holding that forfeiture of entire sum of undeclared currency violates right to be free from excessive fines).

Third, Mrs. Abbott contends that Mr. Abbott does not have a "right of custody" because he cannot

"determine" A.J.A.'s place of residence. This argument founders at the outset, however, because the definition of "right of custody" does not depend on any "determination." The "determination" of the child's residence is just one illustration of a right of custody. *See supra* at 5-8.

Mrs. Abbott nonetheless focuses on the word "determine," arguing that the possibility of a judicial override by a Chilean court means that Mr. Abbott cannot "'decide or settle [A.J.A.'s residence] conclusively and authoritatively.'" Resp. Br. 20-21 (citing AMERICAN HERITAGE COLLEGE DICTIONARY 379 (3d ed. 1997)). But that definition of "determine" is inappropriate for the context of the Convention, which all agree recognizes "joint" custody rights under which neither parent has such a conclusive power. In this context, "determine" is more naturally defined as "to set bounds or limits to" – for example, "a: to fix the boundaries of[; or] b: to limit in extent or scope." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 616 (3d ed. 1993). Mr. Abbott certainly has the right to fix the boundaries, or limit the scope, of A.J.A.'s residence at the Chilean border. It is furthermore unremarkable that the Chilean court can override Mr. Abbott's refusal to authorize A.J.A.'s departure from the country if the refusal is made "without good reason"; virtually all custody rights can be overridden or altered by a court. *See, e.g.*, Tex. Fam. Code § 156.101 (allowing for modification of orders when modification "would be in the best interest of the child" and at least one criterion, such as change in circumstances, is established).

Fourth, Mrs. Abbott contends that a *ne exeat* right cannot be "exercised," drawing on the provision of Convention Article 3 which provides that a removal is wrongful when it occurs "in breach of rights of custody . . . and at the time of removal . . . those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." *See* Resp. Br. 32. That is plainly incorrect. Mr. Abbott *would have* exercised his right to prevent Mrs. Abbott from taking A.J.A out of Chile had he been aware of her plans, but her covert conduct – providing incomplete documentation to the law enforcement officers, *see* Pet. Br. 7 – deprived him of the opportunity to do so. One delegate from the United Kingdom explained that the "actual exercise" requirement was intended to "eliminate the possibility of a person demanding custody purely as a harassing tactic," even if he had no actual involvement in the child's life. *Procès-verbal No. 3*, TOME III, at 264; *see also* Pérez-Vera Report, at 448.

Fifth, Mrs. Abbott seeks to narrow the class of rights of custody by arguing that they are limited to only those powers that can be exercised by the parent who has "care of the child." Resp. Br. 33. In support, she cites Article 13 of the Convention, which provides a defense to the remedy of automatic return if "the person . . . having the care of the person of the child was not actually exercising the custody rights." Pet. App. 33a. But the definition of "right of custody" is set forth in Article 5, not Article 13, and it is explicitly broader than the right to care for the child. *See* Pet. App. 28a (Art. 5(a), custody "include[s]" right

to care). The reference in a separate defense is far too thin a reed on which to rest a significant narrowing of a central term of the Convention that is elsewhere defined, particularly given that the drafters intended the "actual exercise" requirement to be easily satisfied in order not to limit the Convention's reach. *Procès-verbal No. 3*, TOME III, at 265 (Statement of Miss Selby of the United States).

In any event, Mrs. Abbott's argument once again assumes its own conclusion – that the phrase "care of the child" narrowly describes day-to-day decisions regarding the child's welfare, as opposed to more broadly encompassing decisions relating to the country of habitual residence. That assumption is unwarranted. The definitional provision of Article 5(a) describes the right to decide the child's "residence" as a "particular" right within the broader right of "care." And as noted above, the better view is that the right to determine the child's "residence" refers equally to the *country* of residence.

Finally, Mrs. Abbott cites the rejection of a Canadian proposal to extend the Convention's return remedy to rights of access. Resp. Br. 35-38 (citing *Procès-verbal No. 3*, TOME III, at 266-67). She notes that one Canadian official stated that this proposal would have extended the return remedy to *ne exeat* rights. *Id.* But there is no indication that any other person in the drafting process agreed, and in particular that anyone else believed that *ne exeat* rights were not already encompassed within the term "right of custody." To the contrary, other speakers immediately responded that the Convention's return

remedy would already apply to *ne exeat* rights. *See* Pet. Br. 43-45.

B. Mrs. Abbott's Argument That Local Law Defines "Right of Custody" Is Incorrect

Mrs. Abbott separately argues that whether Mr. Abbott had a "right of custody" turns on how Chile characterizes a *ne exeat* right under its domestic law. Resp. Br. 26-29; *id.* 15-16. This contention flatly contradicts her other arguments, discussed above, that invoke various terms in the Convention. For example, Mrs. Abbott argues vigorously that the term "rights of custody" should be construed according to its "ordinary sense," a term she seeks to define universally for all cases under the Convention, without regard to the domestic law of any particular signatory. She similarly argues that the meaning of "custody" should be informed by her construction of "right," "care," "determine," and "exercise" – *see supra* Part II.A – all without regard to the meaning of those terms under Chilean law.

Mrs. Abbott's argument is also self-defeating. Chilean law regards a *ne exeat* right at the least as a "right of custody" *for purposes of the Convention*, which is the relevant context. The Chilean ministry charged with implementing the Convention has thus advised the U.S. courts in another Hague Convention proceeding that "the right to authorize the minors' exit of the country" under Article 49 of Minors Law 16,618 of Chile "establishes the right to determine the place of residence," thereby creating "rights of custody" for purposes of the Convention. *See Duran v. Beaumont*, 534 F.3d 142 (2d Cir. 2008), *pet. for*

cert. filed, 77 U.S.L.W. 3369 (U.S. Dec. 12, 2008) (No. 08-775), *Duran* Pet. App. 35a.

The Convention's text and history make clear that the term "rights of custody" is, in fact, properly interpreted autonomously of domestic law. *See* Pet. Br. 3, 30. Article 5 explicitly sets forth a definition of "rights of custody" that, while framed in illustrative terms, necessarily precludes resort to a different, domestic concept of "custody." The drafters adopted the term "custody" not because they intended to incorporate local law but because of the "absence of any established legal definition of the phenomenon which is to be fought." TOME III, at 183, ¶ 37. The *conduct* that the Convention seeks to deter and redress – *i.e.*, abduction – is no more or less "wrongful" whether a particular country categorizes the left-behind parent's rights as involving "custody." Further, allowing the Convention's application to turn on a contracting state's characterization of a parent's rights would be unworkable given the diversity of the legal systems and terminologies in use when the Convention was drafted. Adair Dyer, *Questionnaire and Report on International Child Abduction by One Parent*, *in* TOME III, at 35.[12]

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[12] For example, except as it is used in the Uniform Child Custody Jurisdiction and Enforcement Act, Texas does not employ the term "custody" in its family law. In the divorce proceedings that she filed in that state after leaving Chile, Mrs. Abbott sought to be appointed as A.J.A.'s "sole managing conservator," which is the term used in the Texas Family Code, § 153.132.

Courts and leading commentators accordingly agree that the term "rights of custody" should be construed autonomously. *See, e.g.*, *C v. C*, (1989) 1 W.L.R. 654 (Eng. C.A.) (opinion of Lord Donaldson); BEAUMONT & MCELEAVY, *supra*, at 74. Participants at the first Special Commission meeting held after the Convention's adoption similarly clarified – without any recorded dissents – that "'rights of custody' as referred to in the Convention . . . constitute an autonomous concept." Perm. Bureau of the Hague Conf. on Priv. Int'l Law, *Overall Conclusions of the Special Commission of Oct. 1989 on the Operation of the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction* ¶ 9 (1989).

Mrs. Abbott asserts that her contrary view follows from Article 3, which refers to "rights of custody attributed to a person . . . under the law of the state" of habitual residence, Pet. App. 28a, and the similarly worded *travaux préparatoires*, Resp. Br. 26-27. She misunderstands the text. The term "attributed" refers to the word "rights," not the broader phrase "rights of custody." Article 3 thus requires that the party invoking the Convention have rights recognized by the country of habitual residence, to which the child is to be returned. As noted, the Convention is unconcerned with whether that country categorizes the rights as involving "custody."[13]

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[13] The Special Commission concluded that a right of custody originally granted under foreign law should suffice to trigger the

C. Concerns About Domestic Violence Have No Bearing On the Question Before This Court

Amici Domestic Violence Legal Empowerment and Appeals Project ("LEAP") et al. urge this Court to reject the consistent view of the Central Authorities and courts of signatory nations that a *ne exeat* right is a "right of custody" because that view will "significantly . . . impact adult and child victims of abuse." LEAP Br. 7. But their argument amounts to nothing more than an attack on the Convention itself because it is simply an argument against enforcing the return remedy. The difference between a *ne exeat*

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return remedy if the country of habitual residence would recognize that foreign-granted right. It explained that "this aspect is covered in the present text of article 3 which insists that such a custody order be characterized as such under the law of the State of child's habitual residence." Elisa Pérez-Vera, *Report of the Special Commission*, TOME III, at 191. Mrs. Abbott's attempt to use this language to support the proposition that "rights of custody" are only those defined as such under domestic law wrenches the words from their entirely different context. The final Pérez-Vera report avoids any such ambiguity in the use of the phrase "as such," explaining: "when custody rights were exercised in the State of the child's habitual residence on the basis of a foreign decree, the Convention does not require that the decree had been formally recognized. Consequently, in order to have the effect described, it is sufficient that the decision be regarded as such by the State of habitual residence, *i.e.*, that it contain in principle certain minimum characteristics which are necessary for setting in motion the means by which it may be confirmed or recognized." Pérez-Vera Report, at 447.

right and a more extensive right to care bears no intrinsic relationship to the prospect of spousal abuse. Indeed, while asserting that *ne exeat* rights are a "tool for batterers," LEAP Br. 34, they cite no cases actually involving *ne exeat* rights. Often, as in this case, the *ne exeat* right is imposed by law or at the request of the spouse who later claims abuse.

The Convention contains a separate provision, Article 13(b), to address cases involving domestic violence. The existence of that carefully drawn provision is a complete answer to the suggestion that the Court should narrowly construe "rights of custody" in all cases, including the great many that do not involve abuse. The answer of the *amici* that the exception is too narrowly drawn is, once again, nothing more than a complaint about the Convention itself. The Convention's signatories have made a considered judgment that the best interests of children generally are served by their prompt return to the country of habitual residence. Preamble (Pet. App. 27a); *see also* Pérez-Vera Report, at 432. *Amici* simply seek to re-visit the balance already drawn by the Convention regarding the circumstances in which it is appropriate to trigger a right of return to permit such issues to be decided in the courts of the country of habitual residence. But any change to the Convention's return remedy should be made not by this Court but instead by the contracting parties, who (as LEAP acknowledges) are aware of issues posed by domestic violence and are attempting to address them. LEAP Br. 5-6.

Further, the protests regarding the exception are unfounded. There is no reason to assume that the

courts have failed to faithfully apply Article 13(b). To the contrary, courts in the United States have applied Article 13(b) to deny return in cases involving serious abuse of the spouse and/or children. *See, e.g.*, *Baran v. Beaty*, 526 F.3d 1340, 1352-53 (11th Cir. 2008); *Walsh v. Walsh*, 221 F.3d 204, 220-21 (1st Cir. 2000). Even in those cases in which courts reject that defense to the return remedy, the abducting parent remains free to seek the protections of the court of the country of habitual residence.

For her part, Mrs. Abbott makes a passing attempt to sway this Court's resolution of this case by making unsubstantiated accusations and implying that her domestic situation forced her to leave Chile. Mrs. Abbott suggests that she was a victim of domestic violence throughout her marriage but omits that she has never before made that claim in *either* these proceedings or the state court proceedings that she initiated after abducting A.J.A. to Texas, a significant omission that speaks volumes regarding the credibility of her claims. Mrs. Abbott's allegations rest solely on her own early accusations in the Chilean family courts, accusations that were never accepted by the Chilean courts, which in fact found "no proof that [Mr. Abbott] was not qualified to exercise" his rights to a direct and regular relationship with his son. J.A. 14.

Similarly, Mrs. Abbott's insinuation that she was forced to "relocate[]," Resp. Br. 8, due to visa problems and a dearth of funds rests solely on a single paragraph in her trial brief that she herself subsequently acknowledged as "unsupported allegations." C.A. Rec. 129, ¶ 14 (response to motion

for a new trial). But in any event, that fact only highlights that her interest in this case lies principally in her own personal convenience, which is no justification for her to abduct Mr. Abbott's son and deprive Mr. Abbott of his enforceable rights under the Convention relating to A.J.A.

Finally, to the extent Mrs. Abbott has any legitimate concerns, she gives no reason to doubt that the courts of Chile provide a suitable forum to resolve them. Among other things, as Mrs. Abbott herself emphasizes, a court has the power to override Mr. Abbott's *ne exeat* right if it concludes that Mr. Abbott has unreasonably withheld permission for Mrs. Abbott to leave the country with A.J.A. The Convention contemplates that such a question should be resolved by courts in the child's country of habitual residence, and this Court should so hold.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's opening brief and the brief of the United States, the decision of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

(5)

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No. 08-645

IN THE
Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,
Petitioner,

v.

JACQUELYN VAYE ABBOTT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

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Pursuant to Supreme Court Rule 15.8, Respondent Jacquelyn Abbott respectfully submits this supplemental brief in response to the Brief for the United States as Amicus Curiae, filed in this matter on May 28, 2009, at this Court's invitation.

1. The Government's brief suggests that the way in which American courts have resolved the question presented conflicts with the "majority" or "prevailing" view among the Convention's 80 other signatories. Govt. Br. 14-16; Resp. Opp. 14. But the Government's brief cites cases from only five of these 80 countries as evidence of this supposed "majority." Govt. Br. 14. Moreover, the Government does not address the facts of the six cases cited, and, as Respondent has previously demonstrated, at least two of them do not turn solely on *ne exeat* rights. *See* Resp. Opp. 18 (discussing *Abrahams* and *Sonderup*). Attempting to cast the decisions of U.S. courts as anomalous, the Government also erroneously dismisses decisions of the Supreme Court of Canada as dicta. Govt. Br. 14 n.11. But the Government fails to refute Respondent's showing that those decisions are not dicta because they were the basis on which the applicants' claims under the Convention were decided. Resp. Opp. 15-16. Finally, the cited practice guide (Govt. Br. 16) also fails to establish the existence of a "majority" position since it simply rehashes the same handful of cases previously discussed in the Petition and Respondent's Opposition. *See* Hague Conference on Private International Law, *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice*, 43 nn.173-75 (2008). As the guide acknowledges, the question presented is a "more

difficult case" on which "there is a division of judicial opinion...." *Id.* at 42-43. In all events, unlike a circuit split, any conflict among courts of different nations cannot be resolved by this Court.

2. The Government places heavy reliance on criticism of an early French decision in the 1993 *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction* (the "1993 Report"). Govt. Br. 15-16. That reliance is unsound. First, it is the intent of the original signatories as reflected in the 1980 Convention that matters, not the views of attendees of a special commission 13 years after ratification. *See* Resp. Opp. 25-26. The Government does not challenge Respondent's showing that the negotiating States rejected the extension of the return remedy to access-rights holders like Petitioner, Resp. Opp. 27, and it does not disclose the position of the United States in the negotiations. Second, a Special Commission meeting is merely an assembly of "experts" designated by States who review and debate the practical operation of the Convention; these are not diplomatic sessions of representatives with the power to take binding positions on behalf of States. *See* P.R. Beaumont & Peter E. McEleavy, *The Hague Convention On International Child Abduction* 25 (1999). Only 23 signatory States even sent representatives to the 1993 Special Commission meeting. 1993 Report ¶ 1. A report of a Special Commission meeting should have no more interpretive weight in construing the Convention text than, for example, a congressional commission on the

reform of the antitrust laws is given in interpreting those statutes.

3. The Government's brief asserts that the Fifth Circuit's decision and others like it "threaten to undermine the efficacy of the Convention." Govt. Br. 18. However, as just discussed, no such view has been expressed by the Convention's signatories. And the Government's Brief does not demonstrate (or even assert) that a significant number of petitions arising under Article 12 of the Convention turn on the interpretation of *ne exeat* rights. As Respondents have demonstrated, the complexity of family law cases is such that few cases are likely to depend on this issue. Resp. Opp. 20-21.

4. The Government's Brief confirms that Respondent's analysis of existing circuit law, including the Eleventh Circuit's *Furnes* decision, is accurate. As the Government forthrightly observes, *Furnes'* conclusion that the petitioning parent was entitled to return of the child was based not on a *ne exeat* right alone, but on the combination of a *ne exeat* right and rights of "joint parental responsibility" created by Norwegian law. Govt. Br. 17. Consequently, *Furnes'* holding does not contradict the Fifth Circuit's decision in this case. *See* Resp. Opp. 10-11. Unlike Petitioner, the Government does not attempt to suggest that the Tenth Circuit's *Shealy* decision, the Sixth Circuit's *Friedrich* decision or the Seventh Circuit's *Vale* decision address the question presented. *See* Resp. Opp. 11-13.

5. The Government unduly discounts the vehicle problems in this case. No court has considered the implications of a *ne exeat* law that vests the ultimate

power of decision in the court, where the only "right" vested in the non-custodial parent is the right to require a court determination. The Government now advances the novel position that all that is needed for a "right of custody" is "a meaningful ability to participate in the decision whether a relocation should occur." Govt. Br. 20. But no court has equated custodial rights with participation rights, and this simply highlights the *sui generis* nature of this case and the need for further development of this issue.

*****

The Convention aims to promote a child's best interests by maintaining the *custodial* status quo. U.S. courts have uniformly concluded that this goal is not effectuated by forcing a child in the U.S. to return to a country even in the absence of the parent with full custodial rights, where the remaining parent only previously exercised access rights protected by a *ne exeat* prohibition. Neither the Petition nor the Government's brief offers any basis on which to conclude that this conclusion is incorrect, that it deviates from the result that would obtain in the majority of signatory nations, or that it hampers the Convention's effectiveness.

CONCLUSION

The petition for a writ of certiorari should be denied.

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AMICUS CURIAE BRIEF

(9)

No. 08-645

In the Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT, PETITIONER

v.

JACQUELYN VAYE ABBOTT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a *ne exeat* order, which prohibits either parent from removing a child from the country without the other parent's consent, confers a "right of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction, thus allowing a parent to seek to have a child who was removed to another country in violation of the *ne exeat* order returned to his or her country of habitual residence.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question presented in this case is whether a *ne exeat* order, which prohibits either parent from removing a child from the country without the other parent's consent, confers a "right[] of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction. The United States has a substantial interest in the manner in which the Convention is interpreted by the courts of this country. In response to this Court's invitation, the Solicitor General filed a brief at the petition stage on behalf of the United States as amicus curiae, recommending that the Court grant the petition for a writ of certiorari.

STATEMENT

1. The Hague Convention was adopted in 1980 to address the growing problem of international child abduction by persons involved in child custody disputes. *Hague International Child Abduction Convention; Text and Legal Analysis (Convention Text and Legal Analysis)*, 51 Fed. Reg. 10,498 (1986); see The Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention or the Convention), *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 49.[1] To facilitate the international cooperation that is necessary to deter and remedy such abductions, the Convention establishes uniform legal standards and remedies to be employed by States parties when a child is abducted from one country to another. See 42 U.S.C. 11601(a); see also Convention introductory decls., Art. 1. In particular, the Convention provides that children abducted in violation of a parent's custody rights should be promptly returned to their country of habitual residence. See *id.* Art. 1. The return remedy is designed to "protect children internationally from the harmful effects of their wrongful removal or retention" by quickly restoring them to their established family and social networks. See *id.* introductory decls.; 51 Fed. Reg. at 10,504. The remedy also prevents the abducting parent from gaining any legal advantage by removing the child to a different jurisdiction, and ensures that decisions relating to the child's custody are made by the courts of his or her country of habitual residence. See *id.* at 10,498.

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[1] The English-language text of the Convention is reprinted at 51 Fed. Reg. at 10,498-10,502, together with an analysis prepar d by the Department of State and submitted to the Senate Committee on Foreign Relations in connection with the Senate's consideration of the Convention. See *id.* at 10,494, 10,503-10,516.

The Convention applies to any child under the age of 16 who is "wrongfully removed" from one contracting State to another. Convention Arts. 1(a), 4. Removal is "wrongful[]" if (1) it is "in breach of rights of custody attributed to a person, * * * either jointly or alone, under the law of the State in which the child was habitually resident," *id.* Art. 3(a), and (2) "at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention," *id.* Art. 3(b). "[R]ights of custody," for purposes of the Convention, "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." *Id.* Art. 5(a).

Upon finding that a child's removal was wrongful—that is, that it violated the custody rights of the left-behind parent—authorities in the State where the child has been brought must, subject to certain defenses, "order the return of the child forthwith."[2] Convention Art. 12. That remedy reflects the Convention's premises that custody determinations should be made by the courts in the child's country of habitual residence, and that the abducting parent should gain no benefit from attempting unilaterally to change the forum. Elisa Perez-Vera, *Explanatory Report*, in 3 *Actes et Documents de la Quatorzième Session (Child Abduction)* 426, paras. 16, 19, at 429-430 (Permanent Bureau trans. 1982) (*Explanatory Report*). Accordingly, a court considering a petition for the return of the child is not to adjudicate who should have custody or adjust the parties'

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[2] In contrast, the Convention does not provide the return remedy for violations of "rights of access," which "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention Art. 5(b). Rather, an individual whose access rights have been violated may petition to "secur[e] the effective exercise of" her rights. *Id.* Art. 21.

respective custody rights, and any decision made concerning return under the Convention "shall not be taken to be a determination on the merits of any custody issue." Convention Arts. 16-17, 19.

The United States participated in the negotiations concerning the Convention's terms, see *Members of the First Commission, Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents*, at 253-255, and the Convention entered into force for the United States in 1988. See T.I.A.S. No. 11,670, *supra*. In order to implement the Convention, Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq.*, which establishes procedures for requesting return of a child abducted to the United States.[3] In so doing, Congress found that "concerted cooperation pursuant to an international agreement" and "uniform international interpretation of the Convention" were necessary to combat international child abduction. 42 U.S.C. 11601(a)(3) and (b)(3)(B).

ICARA authorizes "[a]ny person" seeking return of a child pursuant to the Convention to file a petition in state or federal court. 42 U.S.C. 11603(b). The court "shall decide the case in accordance with the Convention." 42 U.S.C. 11603(d). A child determined to have been wrongfully removed is to be "promptly returned," unless the party op-

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[3] As required by Article 6 of the Convention, ICARA also provides for a "Central Authority for the United States," to be designated by the President. 42 U.S.C. 11606(a). Each Central Authority is charged with "promot[ing] co-operation amongst the competent authorities in their respective States" and performing various duties, including facilitating voluntary returns and providing legal and investigative resources. Convention Art. 7. The Office of Children's Issues in the Bureau of Consular Affairs in the State Department serves as the Central Authority for the United States. See 22 C.F.R. 94.2.

posing return establishes the applicability of one of the Convention's "narrow exceptions." 42 U.S.C. 11601(a)(4), 11603(e)(2). Those exceptions—which include situations in which the child would face a "grave risk" of harm upon his or her return, Convention Art. 13(b), the child is old enough to object, *id.* Art. 13, or return would violate "fundamental principles of the requested State," *id.* Art. 20—may be raised as affirmative defenses to the return of the child.[4] 42 U.S.C. 11603(e)(2).

2. Petitioner is a British subject who married respondent, a United States citizen, in England in 1992. Pet. App. 1a. In 1995, while living in Hawaii, the couple had a child, A.J.A. *Id.* at 1a, 16a. Eventually, all three moved to Chile. *Id.* at 1a. In March 2003, petitioner and respondent separated. *Id.* at 1a-2a. The Chilean family courts granted respondent daily care and control of A.J.A. and accorded petitioner "'direct and regular' visitation rights," including a full month of summer vacation. *Id.* at 2a, 16a-17a. The courts also entered, at respondent's request, a *ne exeat* order that prohibited either parent from removing A.J.A. from Chile without the other's consent. *Id.* at 17a.[5]

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[4] In the domestic context, the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), 9 U.L.A. §§ 201-202 (1999), similarly provides that a court that makes an initial custody determination maintains exclusive and continuing jurisdiction over that determination. The UCCJEA also attempts to deter interstate child abduction by providing that courts generally must recognize and enforce, by any available remedy, existing custody and visitation decrees entered in other jurisdictions, *id.* § 303.

[5] Petitioner also held a *ne exeat* right under a Chilean statute that requires authorization from a parent having visitation rights before the other parent may take a child out of Chile. See Pet. 4 (citing Minor's Law 16,618 art. 49 (Chile)); Pet. App. 61a; see also *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142, 147-148 (2d Cir. 2008) (characterizing Minor's Law 16,618 art. 49 as conferring a *ne exeat* right), petition

In August 2005, respondent removed A.J.A. from Chile without petitioner's consent. At the time, petitioner was seeking to expand his rights with respect to A.J.A., and several motions were pending before the Chilean family court. Subsequently, petitioner hired a private investigator and located his son in Texas. Pet. App. 2a.

3. Petitioner commenced this action in the District Court for the Western District of Texas in May 2006, seeking to have A.J.A. returned to Chile pursuant to the Convention and ICARA. Pet. App. 2a-3a, 18a. The district court denied relief. *Id.* at 15a. The court acknowledged that respondent's removal of A.J.A. without petitioner's consent "violated and frustrated the Chilean court's order." *Id.* at 19a-20a, 24a. The court concluded, however, that the removal was not "wrongful" within the meaning of the Hague Convention because petitioner's *ne exeat* right did not constitute a right of custody under the Convention. *Id.* at 26a.

The court of appeals affirmed. Pet. App. 1a-14a. The court observed that the courts of appeals are divided on the question whether a *ne exeat* right constitutes a "right[] of custody" for purposes of the Convention. *Id.* at 6a-7a. As the court noted, three courts have concluded that a *ne exeat* right is not a custody right. See *Fawcett* v. *McRoberts*, 326 F.3d 491, 500 (4th Cir.), cert. denied, 540 U.S. 1068 (2003); *Gonzalez* v. *Gutierrez*, 311 F.3d 942, 948-949 (9th Cir. 2002); *Croll* v. *Croll*, 229 F.3d 133, 138-139 (2d Cir. 2000), cert. denied, 534 U.S. 949 (2001). The Eleventh Circuit, the court below noted, "has reached the opposite conclusion." Pet. App. 6a-7a (footnote omitted); see *Furnes* v. *Reeves*, 362 F.3d 702, 720, cert. denied, 543 U.S. 978 (2004). The court of appeals also stated that "foreign courts disagree

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for cert. pending, No. 08-775 (filed Dec. 12, 2008).

regarding whether *ne exeat* rights are 'rights of custody' within the meaning of the Hague Convention." Pet. App. 11a.

Adopting the Second Circuit's analysis in *Croll*, the court of appeals held that petitioner was not entitled to have A.J.A. returned to Chile, because the *ne exeat* right is only a "partial power" that gives petitioner "a veto" over A.J.A.'s country of residence, but not a "right[] to determine where in Chile his child would live." Pet. App. 7a-8a, 13a. The court also emphasized the Chilean courts' grant of physical custody to respondent, and determined that petitioner possessed only rights of access (see note 2, *supra*), not rights of custody. *Id.* at 13a-14a. Under the Convention, the court concluded, petitioner's access rights could not provide a basis for ordering the return of the child to Chile. *Ibid.*

SUMMARY OF ARGUMENT

Petitioner's *ne exeat* right is a right of custody within the meaning of the Hague Convention. The Convention defines custody rights broadly, in order to protect from interference all of the ways in which domestic law can accord parents control over decisions affecting a child's care and residence. "[R]ights of custody" under the Convention include the "right to determine the child's place of residence," Convention Art. 5(a), and they may be held "jointly," *id.* Art. 3(a), or divided between parents. This broad definition easily encompasses a *ne exeat* right. A parent who holds such a right possesses a joint "right to determine the child's place of residence," because he has the ability to decide whether the child may be taken outside of the country of habitual residence. In addition, the holder of a *ne exeat* right has the ability to take part in decisions

about the child's residence even outside the country by imposing conditions on the relocation.

Understanding a *ne exeat* right as a "right[] of custody" also best gives effect to the Convention's object and purpose. A *ne exeat* order reflects the intent of the country of habitual residence that, if the parents cannot agree on whether the child may leave the country, the home country's authorities should have the opportunity to adjudicate the dispute and, if necessary, to adjust custody arrangements. Construing the phrase "rights of custody" to include *ne exeat* rights furthers the Convention's purpose of ensuring that decisions relating to the child's custody are made by these home country authorities, rather than by authorities in the country to which the child has been abducted. This interpretation accords with the Convention's negotiating history. And it best serves the United States' interests. The United States has the greatest opportunity to obtain the return of abducted American children, regardless of their nationality, if the Convention is applied consistently to ensure that children are returned to their country of habitual residence when they have been wrongfully removed from that country in breach of a parent's right of custody.

Other States parties to the Convention, whose interpretations of the Convention are "entitled to considerable weight," *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (citation omitted), have concluded, nearly unanimously, that a *ne exeat* right is a right of custody under the Convention. In addition, the multilateral Special Commission to Review the Operation of the Hague Convention (Special Commission), convened by the Permanent Bureau of the Hague Conference on Private International Law, has twice expressed the view—reflecting a consensus among attending States parties—that a *ne exeat* right is a right of custody.

ARGUMENT

A *NE EXEAT* RIGHT IS A RIGHT OF CUSTODY UNDER THE HAGUE CONVENTION

The task of interpreting a treaty "begin[s] with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 534 (1991) (internal quotation marks omitted). Because multilateral treaties are negotiated and drafted by numerous international delegates, however, "[t]reaties are construed more liberally than private agreements, and to ascertain their meaning [the Court] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Air France* v. *Saks*, 470 U.S. 392, 396 (1985); see *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (citation omitted). Accord Vienna Convention on the Law of Treaties, *concluded on* May 23, 1969, Art. 31(1), 1155 U.N.T.S. 331, 340 (a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"); *id.* Art. 31(3)(b), 32.[6] Here, the Convention's text, purposes, and negotiating history establish that a *ne exeat* right is a "right[] of custody," and the States parties have overwhelmingly interpreted the Convention to provide for the return of the child when a *ne exeat* right is violated.

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[6] Although the United States has not ratified the Vienna Convention on the Law of Treaties, the United States generally recognizes the Convention as an authoritative guide to treaty interpretation. See, *e.g.*, *Fujitsu Ltd.* v. *Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir.), cert. denied, 534 U.S. 891 (2001).

I. THE CONVENTION'S TEXT, PURPOSES AND NEGOTIATING HISTORY INDICATE THAT A *NE EXEAT* RIGHT SHOULD BE CHARACTERIZED AS A "RIGHT[] OF CUSTODY"

A. The Convention's Definition Of Rights Of Custody Is Broad And Encompasses Joint And Single Rights

The text of the Convention provides that "the removal * * * of a child is to be considered wrongful where * * * it is in breach of rights of custody attributed to a person * * * either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention." Convention Art. 3(a). The Convention defines "rights of custody" expansively, stating that they "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." See *id.* Art. 5(a). The definition is purposefully phrased in inclusive, rather than exhaustive, language: the Convention seeks "to protect *all* the ways in which custody of children can be exercised." *Explanatory Report* para. 71.[7]

Consistent with that intent, Article 3(a) explicitly provides that the Convention recognizes "rights of custody" not only when they are vested in a single person holding sole custody, but also when they are held "jointly" with another person. Convention Art. 3(a). Because the Conven-

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[7] Because the *Explanatory Report* is the "official history" and commentary on the Convention and "a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it," 51 Fed. Reg. at 10,503, it is proper to look to the *Explanatory Report* to illuminate the meaning of the Convention's text. See *Saks*, 470 U.S. at 400; see also *Croll* v. *Croll*, 229 F.3d 133, 137 n.3 (2d Cir. 2000) (*Explanatory Report* is "authoritative" interpretive guide), cert. denied, 534 U.S. 949 (2001).

tion's drafters recognized that "courts are increasingly * * * in favour, where circumstances permit, of dividing the responsibilities inherent in custody rights between both parents," the Convention is designed to protect all "types of joint custody" created by "internal law." *Explanatory Report* para. 71. Thus, removal of a child by a parent is "equally wrongful" when the parent shares custody, as when she has none at all, because "such action * * * disregard[s] the rights of the other parent which are also protected by law." *Ibid.*; see 51 Fed. Reg. at 10,506 (Department of State explanation that "[i]f one parent [with joint custody] interferes with the other's equal rights by unilaterally removing * * * the child abroad without consent of the other parent, such interference could constitute wrongful conduct within the meaning of the Convention").

In addition, the Convention contemplates that the "bundle" of custody rights with respect to a child can be divided among two or more people, such that "the violation of a *single* custody right suffices to make removal of a child wrongful." *Furnes* v. *Reeves*, 362 F.3d 702, 714-715 (11th Cir.), cert. denied, 543 U.S. 978 (2004); *id.* at 722 n.17. For instance, the Explanatory Report notes that a parent has "rights of custody" even if the child possesses the right to determine his own residence, because "the right to decide a child's place of residence is only one possible element of the right to custody." *Explanatory Report* para. 78. Thus, a parent who possesses only one or some custody rights within the bundle may seek a child's return. See *C.* v. *C.*, [1989] 1 W.L.R. 654, 662 (Neill, L.J.) (Eng. C.A.) (petitioning parent's possession of one right "included" in the definition of rights of custody is sufficient to make the return remedy available); see also *Whallon* v. *Lynn*, 230 F.3d 450, 457 (1st Cir. 2000) (parent who possessed parental decision-

making authority, but not physical custody, was entitled to return of child).

In sum, the Convention is intended to encompass *all* of the ways in which the domestic law of the various parties may create—and divide—rights of custody. *Explanatory Report* para. 71; *id.* para. 67; see *Furnes*, 362 F.3d at 716 & n.12; *C.*, 1 W.L.R. at 658 (Butler-Sloss, L.J.) (recognizing "limited rights and joint rights"). As a result, the Convention's definition of custody rights is an "autonomous concept," which may be more expansive than a given participating country's domestic conception of custody. Hague Conference on Private International Law, *Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 29 I.L.M. 219, para. 9, at 222 (1990) (*Conclusions of the Special Commission of October 1989*); see *C.*, 1 W.L.R. at 658 (Butler-Sloss, L.J.) ("The words of article 5 * * * may in certain circumstances extend the concept of custody beyond the ordinarily understood domestic approach."); *In re D*, [2007] 1 A.C. 619, 635 (H.L.) (U.K.); see also *Furnes*, 362 F.3d at 711.

B. Petitioner's *Ne Exeat* Right Is A Right Of Custody Under Articles 3(a) And 5(a) Of The Convention

1. a. Under Chilean law, petitioner had the right to refuse to permit A.J.A. to leave Chile. This right arose both from a Chilean statute providing that the "authorization of the father or mother who has the right to visit a child shall also be required" before the child may leave Chile, see Pet. App. 6a (quoting Minor's Law 16,618 art. 49); *id.* at 61a, and from a specific 2004 Chilean court order "prohibiting A.J.A.'s removal from Chile by either [petitioner or respondent] without their mutual consent," *id.* at 17a, 68a-70a.

b. These rights conferred by Chilean law—collectively, the *ne exeat* right—provide petitioner with a jointly shared "right to determine the child's place of residence," and therefore a "right[] of custody." See *Furnes*, 362 F.3d at 714-716, 719-722; *Croll*, 229 F.3d at 146 (Sotomayor, J., dissenting).

The *ne exeat* right provides a joint right to "determine" residence within the meaning of Article 5(a) because a parent who holds a *ne exeat* right has the ability to decide whether the child may be taken outside of the country of habitual residence. See *Furnes*, 362 F.3d at 715. If the parent with physical custody wishes to leave the country, any "determin[ation]" as to the child's country of residence will be the result of a decision made jointly with the *ne exeat* holder.[8]

Decision-making authority with respect to the child's country of residence pertains to "the child's place of residence" within the meaning of Article 5(a). The phrase "place of residence" encompasses both the country and the more particular locale in which the child lives. See *Furnes*, 362 F.3d at 715; *C.*, 1 W.L.R. at 658. The Convention's essential focus is on the country as a place of residence: its entire purpose is to prevent the wrongful removal of chil-

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[8] Respondent argued in opposition to certiorari (Br. in Opp. 21-22) that the *ne exeat* right does not confer sufficient decision-making authority because a Chilean court may override an unreasonable exercise of the right. But the same can be said of *any* custody right, in that courts generally have the power, upon application, to override or modify a prior grant of custody rights. And regardless of the possibility of judicial override, the parent who wishes to relocate must petition the court for permission, rather than leaving unilaterally, thus giving the *ne exeat* holder a meaningful ability to participate in the decision whether any relocation should occur. See, *e.g.*, *C.*, 1 W.L.R. at 663 (Donaldson, M.R.) (*ne exeat* right is a "joint right subject always * * * to the overriding rights of the court," and is a right of custody).

dren across international borders. Convention Art. 1(a); see *Explanatory Report* paras. 15, 56. Therefore, "the only logical construction of the term 'place of residence' in the Convention" is that it "necessarily encompass[es] decisions regarding whether [a child] may live outside of" the child's home country. *Furnes*, 362 F.3d at 715. Even viewing a *ne exeat* right as an unadorned power to veto the other parent's decision to remove the child from the country, it affords the parent holding the right significant say over where the child will live—*i.e.*, inside the country or outside of it, with all the difference that entails. See *id.* at 714; *id.* at 716.

Moreover, inherent in the *ne exeat* right is the affirmative ability to take part in more specific decisions about the child's residence (as well as many other matters). In deciding whether to agree to relocation outside the country, a parent with a *ne exeat* right has the opportunity to impose conditions on the relocation, thereby having a say in which new country, or community within that country, a child will reside. See *Furnes*, 362 F.3d at 715; *C.*, 1 W.L.R. at 663 (Neill, L.J.) ("[T]his right to give or withhold consent[,] * * * coupled with the implicit right to impose conditions, is a right to determine the child's place of residence."); *Croll*, 229 F.3d at 145 (Sotomayor, J., dissenting) (parent holding *ne exeat* right may influence other parent's "selection of the destination country").

In according a parent effective control over the country in which the child will grow up, a *ne exeat* order gives the parent a substantial say in the child's care and development. The choice of country will determine everything from the child's primary cultural identity—the languages she speaks, the games she plays – to the character of the schools that she attends and the opportunities that she will have as an adult. The *ne exeat* right thus confers on the

parent significant, if indirect, "decision-making authority over the child's care." *Furnes*, 362 F.3d at 716 (parent can thus "ensure that [the child] will speak Norwegian, participate in Norwegian culture, enroll in the Norwegian school system, and have Norwegian friends[, and] * * * effectively can decide that [she] will *be Norwegian*."). Petitioner's *ne exeat* right is therefore a right of custody under the Convention.[9]

2. The court of appeals based its contrary holding primarily on two characteristics of the *ne exeat* right that it incorrectly believed rendered it something less than a right of custody. First, the court characterized the *ne exeat* right not as an affirmative right to "determine" residence, but a mere "veto right," Pet. App. 13a, conferring insufficient decision-making authority to count as custodial. See *Croll*, 229 F.3d at 139; Br. in Opp. 28-29. But that reasoning is a mistaken attempt to pry apart two sides of a single coin. To be sure, a *ne exeat* right can be characterized as a veto right that prevents the other parent from removing a child from the country. But as explained above, a veto power necessarily affords the parent holding it an important role in deciding the child's place of residence. And for this reason, a *ne exeat* right can be understood no less accurately as an affirmative right to participate with the other parent

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[9] The Chilean Central Authority considers the *ne exeat* right conferred by Chilean law to merit the return remedy under the Convention. See C.A. App. 38 (letter dated Aug. 16, 2006, from the Chilean Central Authority to United States Central Authority requesting the return of A.J.A. because he "was abducted by [respondent] * * * from La Serena, Chile, in violation of [petitioner's] access rights and in violation of a Court order, which prohibited the child leaving the Country"). Given the Convention's emphasis on promoting uniformity and deterring forum-shopping, 42 U.S.C. 11601(b)(3)(B), the Chilean Central Authority's view that respondent's removal of A.J.A. was wrongful under the Convention is entitled to weight.

in the residence decision. The "veto" implies and effectuates a joint right of control—and as earlier noted, the Convention contemplates that joint rights may count as fully custodial. See *In re D*, 1 A.C. at 635 ("[A] right of veto does amount to 'rights of custody' within the meaning of article 5(a).").

Second, the court relied on what it regarded as the Convention's sharp distinction between "rights of custody" and "rights of access," and concluded that the *ne exeat* right cannot be a right of custody because its purpose is to protect rights of access. See Pet. App. 14a; *id.* at 12a. The Convention does indeed distinguish between access and custody rights, but the court erred in assimilating the *ne exeat* right to a right of access. Unlike the holder of a *ne exeat* right, a parent with access rights has only rights of visitation, see 42 U.S.C. 11602(7), which can be exercised wherever the child resides; the parent does not have the right to participate in decisions concerning the child's country of residence. This difference is fundamental under the terms of the Convention. It explains why the holder of a *ne exeat* right, but not the parent with simple access rights, can invoke the Convention's remedy of return.

3. Construing the *ne exeat* right as a "right[] of custody" also best effectuates the Convention's underlying purpose that decisions regarding custody rights "should take place before the competent authorities in the State where the child had its habitual residence prior to its removal." *Explanatory Report* para. 19. A *ne exeat* order implicates this principle because, in addition to conferring decision-making authority on its holder, it gives the authorities of the country of habitual residence the opportunity to reconsider custody arrangements—for instance, by lifting or modifying the *ne exeat* order or, alternatively, by granting the *ne exeat* holder additional custody rights—if the

parent with physical custody wants to leave the country but cannot obtain the agreement of the *ne exeat* holder. By violating a *ne exeat* order, the parent with physical custody not only disregards the other parent's custody rights, but also unilaterally and wrongfully circumvents the authorities of the country of habitual residence. In so doing, she obtains a new, and perhaps more favorable, forum in which to litigate where the child should live. Refusing to order the return of the child in this situation thus disregards the jurisdiction of the country of habitual residence, and permits the abducting parent to seek and potentially obtain greater custody rights than she was accorded in that country. That is precisely the result that the Convention aims to prevent. See *id.* para. 13; *id.* para. 15.

Respondent contends (Br. in Opp. 30) that the return remedy should not be triggered by a violation of a *ne exeat* right because the parent seeking return—the *ne exeat* holder—does not have physical custody rights. See *Croll*, 229 F.3d at 140 (refusing to order return of child in part because the child would be returned to a parent "whose sole right—to visit or veto—imposes no duty to give care"). The return contemplated by the Convention, however, is a return to the child's country of habitual residence—not a return to a particular person. See *In re D*, 1 A.C. at 634. The return remedy permits the courts of that country to determine whether the child's custody should be adjusted—including, on the petition of the parent with physical custody, whether the *ne exeat* order should be lifted. That effectuates one of the purposes for which the *ne exeat* order was imposed in the first place—namely, permitting the home country's authorities to reconsider custodial arrangements if one parent wants to move to another country—as well as the Convention's goal of ensuring the continuing authority of the country of habitual residence. See

Explanatory Report para. 19; *In re D*, 1 A.C. at 635. And the abducting parent is of course free to return with the child to the country of habitual residence. See *Furnes*, 362 F.3d at 717.

C. The Negotiating History Indicates That The Convention's Drafters Understood A *Ne Exeat* Right To Be A Right Of Custody

"In interpreting a treaty it is proper * * * to refer to the records of its drafting and negotiation." *Saks*, 470 U.S. at 400 (relying on delegates' discussions about treaty language); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 184-187 (1993) (same). Accord Vienna Convention on the Law of Treaties, *supra*, Art. 32. During the negotiations over the Hague Convention, several of the drafters indicated that they believed that a *ne exeat* right would fall within Article 5's definition of "rights of custody," and that violation of a *ne exeat* order would warrant the Convention's return remedy.

Although the primary abduction scenario envisioned by the Convention's drafters involved an individual without custody rights abducting a child away from her sole custodian, see Adair Dyer, *Report on International Child Abduction by One Parent ('Legal Kidnapping')*, in 3 *Actes et Documents* 12, 19-20, the drafters took care to define custody broadly so that the return remedy would apply beyond that situation. See, *e.g.*, *Procès-verbal No. 4*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 268, 271 (*Procès-verbal No. 4*) (statements of Israeli delegate and Chairman); *Procès-verbal No. 2*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 257, 260 (statement of Chairman that Article 3 should use a "formulation which would embrace as many persons and entities

as possible"); *Explanatory Report* para. 71. Thus, the drafters agreed that Article 5 encompassed joint and divisible custody rights, even though the concept of shared or divided custody was relatively new in some States parties' domestic legal systems. *Procès-verbal No. 3*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 263, 264 (*Procès-verbal No. 3*); *id.* at 267; *Explanatory Report* para. 71.[10]

With respect to *ne exeat* rights specifically, the preliminary questionnaire submitted to the Hague Conference's member States for consideration posited that removing a child in violation of a *ne exeat* order would constitute wrongful removal. Adair Dyer, *Questionnaire on International Child Abduction by One Parent*, in 3 *Actes et Documents* 9, 9 explanatory note D (describing as abduction the removal of a child "by a parent from one country to another in violation of a court order which expressly prohibited such removal"). Prior to drafting the Convention, the Hague Conference's Special Commission on international child abduction met to discuss the questionnaire and other preliminary documents, and concluded that the Convention

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[10] Although the representative of the Commonwealth Secretariat (an intergovernmental association based in the United Kingdom), who was an observer in the negotiations, suggested that Article 5(a) should be "clarif[ied]" to make explicit its inclusion of "separable" custody rights—for instance, when the right to determine the child's residence and the right to care for the child were vested in different people, *Procès-verbal No. 4*, at 271—the drafting committee ultimately decided not to make any revisions. In reporting that decision, Adair Dyer, First Secretary at the Permanent Bureau, stated that "the existing definition of custody rights embraced the situation where rights of [physical] custody and the right to determine a child's place of residence were vested in different persons." *Procès-verbal No. 14*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 342, 344. No delegate objected to this characterization.

should be drafted to "cover *all* types" of abduction described in the questionnaire. *Conclusions Drawn from the Discussions of the Special Commission of March 1979 on Legal Kidnapping*, in 3 *Actes et Documents* 162, 162-163 (synthesizing the "discussions held by the Special Commission"); see Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 18 (1999).

When the subject arose during negotiations, the Canadian delegate characterized the *ne exeat* right as a "right[] of access,"[11] and urged that violation of a *ne exeat* right should constitute a "wrongful removal" and therefore that Article 3 of the Convention should provide the return remedy for violations of access rights as well as custody rights. *Procès-verbal No. 3*, at 266. The delegate from the Netherlands responded that "under the present terms of the Convention," which included a substantially similar version of Articles 3 and 5(a), "the abducted child would have to be sent back immediately"—thus indicating that he understood the *ne exeat* right to be a "right[] of custody" that would trigger the return remedy. *Ibid.* No other delegate disagreed, and the representative of the Commonwealth Secretariat concurred that "article 5 * * * could cover cases where the non-custodial parent had a right to be consulted."[12] *Ibid.* The Canadian proposal to expand Article

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[11] The Canadian delegate's characterization may have been influenced by his understanding of Canadian law, which, he noted, generally awarded sole "custody" to one parent and "access" rights to the other. *Procès-verbal No. 3*, at 267.

[12] The chair of the negotiations, A.E. Anton, later wrote that it was "less clear" whether a *ne exeat* order should be viewed as a right of custody under Article 5(a)'s definition, and that "[a] suggestion that the definition of 'abduction' be widened to cover this case was not pursued.'" A.E. Anton, *The Hague Convention on International Child*

3 to make the return remedy available for access rights was defeated, *id.* at 267, suggesting that the delegates understood the existing language of custody rights in Articles 3 and 5(a) to encompass the rights arising from *ne exeat* orders.

D. The Executive Branch Interprets The Convention To Provide The Return Remedy For *Ne Exeat* Violations

Consistent with this history, the Department of State, whose Office of Children's Issues serves as the Central Authority for the United States under the Convention, has long understood the Convention as including *ne exeat* rights among the protected "rights of custody."[13] The Executive Branch's interpretation of a treaty "is entitled to great weight." *Medellin* v. *Texas*, 128 S. Ct. 1346, 1361 (2008) (quoting *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982)); see *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999). The Executive Branch's interpretation should not be rejected here, particularly because it is consistent with the interpretation by the great majority of parties that have addressed the issue. As this Court observed in *Sumitomo*, where the States parties are in agreement, the Court's role—absent extraordinary

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Abduction, 30 Int'l & Comp. L.Q. 537, 546 (1981). Anton stressed, however, that his statements reflected his views alone, not those of the drafters. *Id.* at 537 n.*. The negotiating history strongly indicates that the drafters believed that the existing language of Articles 3 and 5(a) was broad enough to encompass the *ne exeat* right.

[13] Prior to the United States' filing, upon the Court's invitation, of a brief amicus curiae supporting certiorari in this case, the State Department had not formally memorialized its interpretation, although that filing in itself represents the Department's "considered judgment on the matter." *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997). But the State Department has informed this Office that the position set forth in that brief and this one has long been its view.

circumstances not present here—is to "giv[e] effect to the intent of the Treaty parties." 457 U.S. at 185.

II. THE POST-RATIFICATION UNDERSTANDING OF THE CONVENTION SUPPORTS THE CONCLUSION THAT A *NE EXEAT* RIGHT IS A CUSTODY RIGHT

In interpreting the language of a treaty, "the opinions of our sister signatories [are] entitled to considerable weight." *Saks*, 470 U.S. at 404 (citation omitted) (relying on foreign intermediate and highest court decisions); *El Al*, 525 U.S. at 175-176 & n.16 (same). That is particularly so with respect to the Hague Convention. Disagreement among States parties provides abducting parents with the ability to forum shop in order to obtain the most favorable rule, and uniformity in application therefore is key to the Convention's goals of deterring international parental abduction and achieving the prompt return of abducted children. See Convention Art. 1; *Explanatory Report* para. 16; *In re D*, 1 A.C. at 632. Indeed, in enacting the Convention's implementing legislation, Congress explicitly recognized "the need for uniform international interpretation of the Convention." 42 U.S.C. 11601(b)(3)(B).

It thus is significant that there is near-unanimous agreement among the States parties to the Convention that *ne exeat* rights are "rights of custody" within the meaning of Articles 3(a) and 5(a). Outside of the United States, all but one of the judicial decisions to squarely consider the issue have held that a *ne exeat* right is a custody right, and the States parties, in multilateral meetings addressing the operation of the Convention, have expressed a consensus that the majority rule is the correct one.

A. All But One Of The Courts In Other States Parties To Consider The Issue Have Held That A *Ne Exeat* Right Is A Right Of Custody

1. Courts in the United Kingdom, Germany, Austria, South Africa, Australia, New Zealand, and Israel have adopted the view that a *ne exeat* right creates a right of custody. That represents a majority of the courts to address the question. See *In re D*, 1 A.C. at 635 (noting agreement of a "majority of the common law world").

In *C.* v. *C.*, one of the earliest decisions to consider the issue, the English High Court of Justice held that the Convention recognizes custody rights "held jointly or alone," and that because the *ne exeat* right gave the father "the right to ensure that the child remain[ed] in Australia or live[d] anywhere outside Australia only with his approval," the *ne exeat* right was a "limited" or "joint" custody right under the Convention. 1 W.L.R. at 658. The House of Lords subsequently reaffirmed that holding, noting that the *ne exeat* right—which it referred to as a "veto right"—provided the right to determine residence in a "general" sense, namely, the country of residence. *In re D*, 1 A.C. at 633; see also *A.J.* v. *F.J.*, [2005] ScotCS CSIH_36.

The Federal Constitutional Court of Germany also held that a *ne exeat* right is a "right to have a say in the child's place of residence," and affirmed an intermediate court's conclusion that removal in violation of the *ne exeat* right was wrongful because the mother "should have obtained a judicial decision in Argentina if the father refused to agree to the move to Germany." Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 1997, 2 BvR 1126/97 (F.R.G.), para. 15.[11] Similarly, the Austrian

[11] Although the petitioning father also possessed the right to consult regarding the children's care, the court focused on the *ne exeat* right

Supreme Court characterized the *ne exeat* right as a joint right to determine residence, stating that a violation of "an express order by the competent court not to remove a child from the country without the consent of the other parent" implicates the core purposes of the Convention. Oberster Gerichtshof [OGH] [Supreme Court] Feb. 5, 1992, 2 Ob 596/91.

Courts in Australia and New Zealand agree. In *In the Marriage of Resina*, the Family Court of Australia "follcw[ed]" *C.* v. *C.* in concluding that a *ne exeat* right is a right of custody, noting that "uniformity itself is highly desirable." [1991] FamCA 33, para. 26 (Austl. Fam.). Similarly, in *Secretary for Justice* v. *Abrahams, ex parte Brown*, [2001] FP 069/134/00 (Fam. Ct.) (Taupo, N.Z.), a New Zealand family court held that because "guardianship" rights under South African law included a *ne exeat* right, the holder of guardianship rights had a "right to determine the children's place of residence" under the Convention.[15]

In *Sonderup* v. *Tondelli*, 2000(1) Constitutional Court of South Africa 1171, para. 25, the Constitutional Court of South Africa held that a *ne exeat* clause in an interim custody order constituted a custody right because it limited the conditions under which the parent who had the right to

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because it viewed the right to jointly determine the children's residence to be a "central element" of custody rights under the Convention. 2 BvR 1126/97, *supra*, para. 13(a).

[15] Although respondent contends (Br. in Opp. 18) that the *Abrahams* court relied on the existence of broader "co guardianship" rights in addition to the *ne exeat* right, the court based its decision on a finding that the requesting parent "must consent to the removal of the children" from the country and therefore "ha[d] a right to determine the child's place of residence." *Abrahams*, *supra*.

physical custody could exercise her rights.[16] The court emphasized that the Convention "seeks to ensure that custody issues are determined by the court in the best position to do so by reason of the relationship between its jurisdiction and the child," *id.* para. 30, and concluded that ordering the return of a child removed in violation of a *ne exeat* order would further that purpose.

Finally, the Supreme Court of Israel has also concluded that a *ne exeat* right is a custody right, holding that "for the purpose of the Convention and the law, 'custodial rights' should be broadly construed, so as to cover cases in which parental consent is required before a child may be taken from one country to another." C.A. 5271/92 *Foxman* v. *Foxman*, para. 4(d), [1992] (H.C.) (Isr.). The court concluded that "it is clearly necessary to return the daughters to the place from which they were taken to enable the litigants to litigate in the competent court regarding custody and visitation rights." *Id.* para. 5.

2. To our knowledge, only one court in another State party has held that a *ne exeat* right does not constitute a right of custody. In *Ministère Public* c. *Mme. S.*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Perigueux, Mar. 17, 1992, D.S. Jur. 1992 (Fr.), a French trial court refused to order return of children to Great Britain because it viewed the *ne exeat* order as a mere condition on the mother's exercise of her custody rights, and also as an impermissible restriction on the mother's right to expatriate under the European Convention for the Protection of Human Rights and Fundamental

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[16] Respondent argues (Br. in Opp. 18) that the court's decision rested on the interim status of the custody order in which the *ne exeat* right appeared, but the court's conclusion that the *ne exeat* right limited the rights of the parent with physical custody did not depend on the interim nature of the order. *Sonderup*, *supra*, para. 25.

Freedoms. That decision, however, is inconsistent with an earlier French appellate decision, see *Ministère Public* c. *M.B.*, Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, Mar. 23, 1989, which held that by "granting the [petitioning parent] the right to accept or reject the change of the children's residence outside of a certain region, the order dated November 27, 1987 established joint exercise of the rights of custody in the sense of the Hague Convention."

Respondent also relies on two decisions of the Supreme Court of Canada, but in both cases the statement that a *ne exeat* right may not be a right of custody was dicta. See *Thomson* v. *Thomson*, [1994] 119 D.L.R. (4th) 253; *D.S.* v. *V.W.*, [1996] 134 D.L.R. (4th) 481. In *Thomson*, the court ordered the return of a child based on violation of a *ne exeat* clause in an interim custody order, but suggested that a final *ne exeat* order would "raise[] quite different issues" because such an order is "usually intended" to protect access rights. In *D.S.*, the petitioning parent had no *ne exeat* right, but asserted that a similar restriction—the "right to oppose the child's removal"—was "implicit" in a court order. *Id.* para. 42. The court held that this argument conflated "custody rights in the strict sense with the right to apply for a modification of custody rights after the child is removed," *id.* para. 45, and also noted that *Thomson* had stated that a removal restriction in a permanent custody order "might" constitute only an access right, *id.* para. 26. The court therefore concluded that a return remedy was not available. Because neither decision squarely confronted the question whether a *ne exeat* clause in a permanent custody order constitutes a custody right, both courts' statements were *dicta*. See *In re D*, 1 A.C. at 634 (characterizing statements of Supreme Court of Canada as dicta).

In sum, the prevailing view among courts in States parties to have considered the issue is that a *ne exeat* right constitutes a right of custody. See *In re D*, 1 A.C. at 634 (surveying case law, and noting that opinion in common-law countries was virtually "united"); Hague Conference on Private International Law, *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice* 43 (2008) <http://www.hcch.net/upload/guidecontact_e.pdf> ("preponderance of the case law" holds that *ne exeat* is a custody right, and the opposing view "does not command widespread support").

B. States Parties Have Expressed The View In Subsequent Special Commission Meetings That A *Ne Exeat* Right Is A Custody Right

The Special Commission to review the operation of the Hague Convention has expressed its agreement with the majority judicial view that *ne exeat* rights are custody rights. The Special Commission is convened every four years by the Hague Conference on Private International Law to assist in implementation of the Convention by providing a forum for States parties to discuss interpretive problems arising from the Convention. See *Statute of the Hague Conference on Private Int'l Law* Art. 7, *formulated*, Oct. 9-31, 1951, 15 U.S.T. 2228, T.I.A.S. No. 5710 (2007) (Conference may set up special commissions to study "any questions of private international law that come within the purpose of the Conference"); *Conclusions of the Special Commission of October 1989* paras. 1-2; see also Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. Int'l L. & Pol. 221, 228-229 & n.28 (2000). The Special Commission is composed of representatives from many of the States parties to the Convention, and in particular, their

Central Authorities, who are responsible for administering the Convention.[17] The Commission's reports reflect the consensus views of the participating representatives. In those reports, the Commission has twice stated that a *ne exeat* right is a custody right.[18]

The first Special Commission, meeting in 1989, expressed the opinion that a "parent who has not been awarded 'custody'" under domestic law, but nonetheless has "the right to be consulted and to give or refuse consent before the child is permanently removed" from the country, has a right of custody. *Conclusions of the Special Commission of October 1989* para. 9. A *ne exeat* right, the Commission opined, is a "form of joint holding by the two parents of 'rights of custody' within the meaning of the Convention." *Id.* para. 8. The Commission also discussed *M.B.*, *supra*, as an example of that view. And the Commission noted that *M.B.*'s holding that "the right of the mother to

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[17] All States parties to the Convention, as well as members of the Hague Conference, are invited to participate in each Special Commission meeting, but not all attend. The United States has participated in each meeting since the Commission's inception. Other regular participants include England, Canada, and Germany—some of the parties that most often confront requests for the return of wrongfully removed children. See *A Statistical Analysis of Applications Made in 2003 Under the Hague Convention 25 October 1980 on the Civil Aspects of International Child Abduction* 11-13 (2007); see, *e.g.*, *Report on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* 5-19 (2007).

[18] Respondent notes that views expressed at Special Commission meetings are not legally binding. Cert. Supp. Br. 2-3. Of course it is the treaty itself that is legally binding. Nonetheless, the Commission's participants are official representatives who have extensive experience in implementing and construing the Convention. The Commission's conclusions are a reliable indication of the manner in which States parties are interpreting the Convention.

give or refuse consent to removal of the children, coupled with the father's award of 'custody,' had created a form of joint custody within the meaning of the Convention," *id.* para. 10, was "broadly approved as being in the spirit of the Convention." *Ibid.*

The second Special Commission also touched on the *ne exeat* issue, discussing *Mme. S.*, the French decision holding that violation of a *ne exeat* right did not merit the return remedy. The Commission stated that the court's conclusion that a *ne exeat* right "constituted only a 'modality' attached to the right of custody and not a situation of joint custody, gathered no support." *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, Question 5 (1993). Moreover, the Commission noted, *Mme. S.*'s holding "had been rejected by the *Cour d'appel d'Aix-en-Provence*, as well as by courts in Austria, Australia, the United Kingdom and the United States of America." *Ibid.*

III. THIS COURT SHOULD REMAND FOR FURTHER PROCEEDINGS

Because petitioner's *ne exeat* right is a right of custody, respondent's removal of A.J.A. was wrongful under the Convention. See Convention Art. 3. The Convention's return remedy is therefore available to petitioner, assuming that he actually exercised his custody right, or would have exercised it but for the removal, and that no defense to return applies. *Id.* Arts. 1(a), 3, 13, 20. The courts below did not reach those questions. Although the evidence here strongly suggests that petitioner would have exercised his *ne exeat* right but for the wrongful removal, see *Furnes*, 362 F.3d at 724—it was respondent's failure to comply with the *ne exeat* order that prevented petitioner from exercis-

ing his right—the lower courts may consider that question, as well as the existence of any defenses, see 42 U.S.C. 11601(a)(4), 11603(e)(2), on remand.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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(13)

No. 08-645

In the Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT, *Petitioner*

v.

JACQUELYN VAYE ABBOTT, *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a *ne exeat* order or statutory provision prohibiting a parent from removing a child from the country without the other parent's consent, confers a right of custody within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction, such that a child who was removed in violation of the *ne exeat* provision can be returned to his or her country of habitual residence.

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INTEREST OF AMICUS CURIAE

The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, seeks "to secure the prompt return of children wrongfully removed or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Hague Conv., art. 1. The United States is a signatory of the Convention, and Congress has implemented the Convention in the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 *et seq.*

When the treaty was ratified in 1988, the United States Department of State, acting as the United States Central Authority, directed the Governor of California to designate a state agency to discharge the state's duties under the Convention. 42 U.S.C. § 11606(a); Exec. Order No. 12648, 53 Fed. Reg. 30,637 (Aug. 15, 1988). The Governor of California designated the California Attorney General's Office as the agency responsible for discharging the United States' treaty obligations within California.

The Attorney General, in turn, relies on local district attorneys to assist in discharging the Hague Convention obligations by helping to locate and return abducted children to their countries of habitual residence. *See* Cal. Const. art. 5, § 13; Cal. Gov't Code § 12550. In the decade from 1999 through 2008, California received an average of 75 new incoming applications per year, for a total of 749 cases, from parents abroad seeking the return of, or access to, their children. Of the 749 cases, 75, or about ten percent, involved requests only for access to a child or children. California estimates that a similar number of children are taken out of California to other signatory countries.

Given its designation in response to the State Department directive, and as part of its broader role in resolving parental-child abduction cases under state

law (Cal. Fam. Code, § 3130 *et seq.*), amicus State of California thus plays a substantial role in the implementation of the Convention. Amicus therefore has an interest in how the treaty is implemented and how the resolution of the question presented in this case will affect the success of amicus' work in this area. Amicus' view—that the return remedy should be available in cases involving an international violation of a *ne exeat* order—derives from its state statutory responsibility for resolving parental child abduction cases through civil and criminal means (the latter of which includes responsibility to prosecute violations of criminal law based on breaches of custody and visitation rights in domestic and international cases), its long history of involvement in Hague Convention cases, and its interest in seeing that state court orders are enforced and the principles of comity and reciprocity apply to ensure that the Convention works effectively to resolve international parental child abduction cases.

In handling Hague Convention cases, amicus' prosecutors take no position on the merits of any custody or visitation dispute between parents. They act on behalf of the court, and represent neither party in the proceeding. Cal. Fam. Code § 3455. Amicus' interest lies in securing the enforceability of its state court orders and in seeing that the treaty is properly implemented within California, i.e., that the Convention is properly applied to return wrongfully removed or retained children to their countries of habitual residence.

STATEMENT OF THE CASE

The Hague Convention is designed to protect children from the harmful effects of international parental child abduction by establishing procedures to secure their prompt return to their country of habitual residence. *Whallon* v. *Lynn*, 230 F.3d 450, 454 (1st Cir. 2000); Hague Conv., preamble, 51 Fed. Reg. at 10498 (March 26, 1986). The Convention provides for the

mandatory return of a child wrongfully removed from, or retained outside of, the child's country of habitual residence. Hague Conv., Arts. 3, 12. It defines a wrongful removal or retention as one that violates the custody rights attributed to a person under the law of the country where the child was habitually resident immediately before the child's removal or retention, Hague Conv., Art. 3, 51 Fed. Reg. at 10,498; *Whallon* v. *Lynn*, 230 F.3d at 454; and it expressly states that rights of custody include the right to determine the child's "place of residence," Hague Conv., art. 5(a); 51 Fed. Reg. at 10,498. The Convention distinguishes rights of custody from rights of access, and reserves the return remedy for breaches of the former. Hague Conv., arts. 1, 3, 21; 51 Fed. Reg. at 10,498, 10,500.

Petitioner, a British subject, married respondent, a United States citizen, in England in 1992. While living in Hawaii in 1995, the couple had a child, A.J.A. The family moved to Chile, where the couple separated in 2003. They litigated custody and visitation issues in the Chilean courts, which granted petitioner "direct and regular" visitation rights, including a full month of summer vacation. Both parents were prohibited, under a *ne exeat* order, from removing their child from Chile without written authorization from the court In addition, petitioner held a *ne exeat* right under Chilean law, which requires authorization from a parent holding visitation rights before the other parent can take a child out of Chile.

In 2005, petitioner asked the Chilean court to expand his rights with respect to A.J.A. In turn, respondent removed A.J.A. from Chile without petitioner's knowledge or consent. As respondent concedes, she violated Chilean law and the *ne exeat* order by removing the child from Chile. *Abbott* v. *Abbott*, 542 F.3d 1081, 1083 (5th Cir. 2008). Petitioner located A.J.A. in Texas. Petitioner then initiated proceedings in the federal court in Texas seeking the return of his child to Chile under the Convention.

The District Court denied petitioner's request for

return of the child to Chile, and the Fifth Circuit Court affirmed the decision. Agreeing with *Croll* v. *Croll*, 229 F.3d 133 (2d Cir. 2000), the Fifth Circuit ruled that, although the child's removal violated the Chilean court order and statutory *ne exeat* provision, it was not "wrongful" because "*ne exeat* rights, even when coupled with 'rights of access,' do not constitute 'rights of custody' within the meaning of the Hague Convention." *Abbott*, 542 F.3d at 1087.

SUMMARY OF ARGUMENT

A *ne exeat* right constitutes a right of custody under the Hague Convention, and therefore the Convention's return remedy applies to a breach of that right. This conclusion follows from a correct understanding of the text and context of the treaty and the intent of the Hague Convention's drafters, reflected in their documented discussions and writings, that the breach of a *ne exeat* right is encompassed in the Convention's "right of custody." It also follows from the shared expectations of the other Contracting States, which are reflected both in the reports of their meetings to review the operation of the Convention and in the weight of foreign case law holding that a *ne exeat* right is a right of custody. Convention.

The Fifth Circuit opinion—that a *ne exeat* right is not a right of custody—conflicts with the views of the United States' treaty partners and thus undermines the comity and reciprocity necessary for the effective implementation of the Convention. Lack of reciprocity impairs the ability of State and local prosecutors to fulfill their statutory responsibilities in parental child abduction cases, including their use of the Convention to recover internationally abducted children. Moreover, without a return remedy under the Convention, public prosecutors will be left with few options other than to seek criminal sanctions to address the violation of a *ne exeat* right. That would contravene public policy favoring the use of civil remedies in such

cases and the reservation of criminal remedies as a last resort.

Recognizing a *ne exeat* right as a right of custody enforceable under the Convention, further, aligns with the central importance of the parent-child relationship. That importance is confirmed by the facts that violations of custody and visitation orders, including *ne exeat* orders, are punishable under state and federal criminal law; that a custodial parent's frustration of the other parent's access rights may trigger a transfer of custody to the non-custodial parent; and that the relationship between a parent and child enjoys basic constitutional protection.

ARGUMENT

I. A *NE EXEAT* RIGHT CONFERS A RIGHT OF CUSTODY UNDER THE HAGUE CONVENTION

Amicus supports the arguments made by then-Judge Sotomayor in her dissent in *Croll* v. *Croll*, 229 F.3d 133, by the Eleventh Circuit in *Furnes* v. *Reeves*, 362 F.3d 702 (11th Cir. 2004), and by petitioner in his merits brief, that a *ne exeat* clause confers a "right of custody" within the meaning of the Hague Convention. The factors that guide the interpretation of international treaties weigh heavily in favor of the view that a *ne exeat* right is a right of custody and that the Convention's return remedy may be invoked to remedy a breach of that right. Support for this view is found in the text of the treaty, the context in which the words in question are used, the history of the treaty, the negotiations, the practical construction of the treaty adopted by the parties, and the shared expectations of the contracting parties. See *Air France* v. *Saks*, 470 U.S. 392, 396-97, 399 (1985). Petitioner's merits brief thoroughly demonstrates this. Before addressing some unique policy considerations bearing on the State's interests, amicus highlights its agreement with petitioner on the following major points.

First, the text of the treaty and the context in which the words are used support the view that a *ne exeat* right is a right of custody. The Convention explicitly states that "rights of custody" include "rights relating to the care of the person of the child and, in particular, the right to determine the child's *place of residence*." (Hague Conv., art. 5(a) (emphasis added).) As the Eleventh Circuit explained, the Convention does not concern itself with where a child will live *within* a particular country, but rather with the *international* relocation of the child. *Furnes* v. *Reeves*, 362 F.3d at 715; see also *Croll*, 229 F.3d at 146-48 (Sotomayor, J., dissenting). In the context of the Convention, then, the right to determine a child's "place of residence" clearly embraces the right to participate in deciding in which *country* the child will live. A parent in possession of a *ne exeat* right is empowered to participate in determining the country in which the child will live, and is thus endowed "with significant decision-making authority over the child's care," *Furnes*, at 716, because the parent can help choose the language, nationality, cultural identity, and educational system in which the child will be raised. *Id.* A *ne exeat* right is, therefore, both a right to determine the child's place of residence and "a right 'relating to the care of the person of the child' within the meaning of the Convention," and it fits the treaty's definition of "rights of custody." *Id.*

Further, the history of the Convention reveals that its drafters intended the Convention's terms to be interpreted broadly to include a *ne exeat* right as a right of custody, as evidenced by the Explanatory Report by Elisa Perez-Vera, the official Hague Conference reporter. Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, in 3 Acts and Documents of the Fourteenth Session (1980) (the Perez-Vera Report). In their view, applying the Convention to the greatest number of cases would best effectuate the Convention's objective of restoring the status quo and deterring international forum shopping. *Whallon* v. *Lynn*, 230

F.3d at 455 ("the Convention favors 'a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration.'") (quoting Perez-Vera Report, par. 67, at 446 & n.5); see *Shalit* v. *Coppe*, 182 F.3d 1124, 1130 (9th Cir. 1999).

In line with this liberal interpretation, "the proceedings at the diplomatic conference in October 1980 that adopted the final text of the Child Abduction Convention reflect the delegates' understanding that a move by the custodial parents in violation of a restriction on removal of the child would constitute a wrongful removal." See Linda Silberman, *Symposium Issue Celebrating Twenty Years: The Past and Promise of the Hague Convention on the Civil Aspects of International Child Abduction: Articles and Remarks: Gender Politics and Other Issues*, 33 N.Y.U. J. Int'l L. & Pol. 221, 229 n. 29 (Fall 2000) (citing 3 Hague Conference on Private International Law: Actes et documents de la Quatorzieme Session 266-67 (1980)). Accordingly, the Convention's drafters intended that the return remedy would apply to the breach of a *ne exeat* right. *See* Petitioner's Brief at 42-46; Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 Tex. Int'l L.J. 41, 46 (2003); Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 75-78, 80 (1999).

The Contracting States' support for this view continued in subsequent years, as reflected in the reports of five Special Commission meetings held since the Convention's adoption to review its operation. Amicus California's representatives have attended three of these meetings; its understanding of the Contracting States' views has thus been formed by its presence and participation in the meetings at which these discussions took place. (See http://www.hcch.net/index_en.php?act=text.display&tid=21 for reports reflecting the

conclusions of those meetings.) These reports reiterate the need to accord the term "rights of custody" an autonomous meaning—one that does not depend on any single legal system or coincide "with any particular concept of custody in a domestic law, but that instead draws its meaning from the definitions, structure and purposes of the Convention."[1] These reports make it clear that one must not look only to whether a habitual-residence country *denominates* a particular parental right as a "right of custody" under the Hague Convention, but to whether the applicant-parent possessed rights granted under a law or court order of the habitual-residence country which *in substance* conform to "rights of custody" as contemplated by the treaty.

Like the Special Commission reports, foreign case law also reflects the Contracting States' shared understanding that a *ne exeat* order constitutes a right of custody and that a violation of such an order would be considered a wrongful removal under the Convention. As petitioner's thorough discussion

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[1] *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction Held 18-21 January 1993*, Part Two, Conclusion 2, see http://hcch.e-vision.nl/upload/abdrpt93e.pdf; see also *Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, see par. 8-10 (1990), available at http://hcch.e-vision.nl/upload/abdrpt89e.pdf ("rights of custody . . . in the Convention . . . constitute an autonomous concept, and . . . are not necessarily coterminous with rights referred to as "custody rights" created by the law of any particular country or jurisdiction thereof"); *Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22-28 March 2001), par. 4.1, see http://hcch.e-vision.nl /upload/concl28sc4_e.pdf ("[t]he Convention should be interpreted having regard to its autonomous nature and in the light of its objects").

demonstrates (Pet's Br. at 32-42), the weight of international case law favors the view that a restraint on the removal of the child from the child's country of habitual residence constitutes a right of custody within the meaning of the Hague Convention.[2]

Finally, a liberal view of the Convention's "rights of custody" serves a basic goal of the Convention: to ensure that rights of custody and access in one signatory country are recognized and respected in the other Contracting States. See Hague Conv., art. 1(b). Because "rights of custody" encompass *ne exeat* orders or rights, the treaty may be implemented in a way that more fully ensures that rights of custody and access in

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[2] The Permanent Bureau of the Hague Conference on Private International Law, responsible for monitoring and reviewing the practical operation of the Convention and promoting its effective implementation by the parties, has reached the same conclusion. See *Report on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. During a discussion of "[t]he dividing line between custody and access rights," "[t]he Permanent Bureau noted that a clear preponderance of case law supported the view that [the combination of access rights and a veto on the removal of a child] constituted a custody right for the purposes of the 1980 Convention." (Report, par. 211, at 52, available at http://www.hcch.net/upload/wop/abd_2006_rpt-e.pdf.)

Notably, Judge Sotomayor reached the same conclusion at the time the Second Circuit was deciding *Croll*. 229 F. 3d at 150-53 (Sotomayor, J. dissenting). So have other scholars. *E.g.*, Silberman, 33 N.Y.U.J. Int'l L. & Pol. at 230-32; Christopher B. Whitman, *Croll v. Croll: The Second Circuit Limits "Custody Rights" Under the Hague Convention on the Civil Aspects of International Child Abduction*, 9 Tul. J. Int'l & Comp. L. 605, 624 (Spring 2001); *see* William Duncan, *Symposium Issue Celebrating Twenty Years: The Past and Promise of the Hague Convention on the Civil Aspects of International Child Abduction: Articles and Remarks: A View From the Permanent Bureau*, 33 N.Y.U.J. Int'l L. & Pol. 103, 105 (Fall 2000).

one country are respected in the other. *See Croll*, 229 F.3d at 147 (Sotomayor, J., dissenting). Viewing the breach of a *ne exeat* right as a breach of custody rights remediable by the Convention's return remedy promotes the recognized principle that the habitual-residence country should decide the merits of custody and visitation. *Croll* v. *Croll*, 229 F.3d at 137; see also Perez-Vera Report at par. 34. As Beaumont and McEleavy note in their scholarly monograph on the Convention, a *ne exeat* clause protects a parent with access rights, ensures that the court retains continuing jurisdiction over the case, and preserves a child's right to a meaningful relationship with both parents. Requiring that the custodial parent obtain permission from either the other parent or the court if he or she wishes to relocate necessitates a high level of judicial oversight, but

> this is the only means of ensuring that the rights of all those concerned are given due consideration in a forum with which all should be familiar. Therefore the underlying principle should be that a veto over the removal of a child from its habitual residence should ordinarily amount to a right of custody, and its breach should be sufficient to successfully base a return.

Beaumont & McEleavy, at 79-80.

II. A Restrictive Interpretation Of The Term "Rights Of Custody" Would Impair The State's Ability To Recover Internationally- Abducted Children And Would Undermine The Reciprocity On Which The Convention's Implementation Depends

The sound reasons summarized above demonstrate that a *ne exeat* right constitutes a right of custody under the Convention, and therefore the return remedy applies when such a right is breached. Amicus' experience with a state system in which prosecutors

are involved in handling Hague Convention cases reveals additional practical and policy considerations that support this interpretation of the treaty.

The Hague Convention's return remedy provides prosecutors seeking to fulfill their statutory responsibilities in parental child-abduction cases with an effective, practical, and appropriate mechanism for resolving such cases, and one that fulfills the treaty's objectives. When a custodial parent violates a *ne exeat* order and takes the child to another country, he or she

> nullifies that country's custody law as effectively as does the parent who kidnaps a child in violation of the rights of the parent with physical custody of that child. Moreover, where, as here, the parent seeks a custody order in the new country, she seeks to legitimize the very action – removal of the child – that the home country, through its custody order, sought to prevent. To read the Convention so narrowly as to exclude the return remedy in such a situation would allow such parents to undermine the very purpose of the Convention.

Croll, 229 F.3d at 147 (Sotomayor, J., dissenting); see also Silberman, *supra*, 33 N.Y.U. J. Int'l L. & Pol. at 229. The return remedy reverses the effect of a violation of the *ne exeat* right by returning the abducted child to the habitual-residence country, which is usually the country whose court issued the order and has jurisdiction over matters of custody and visitation. It ensures that rights of custody and access in one signatory country are respected in the others. It provides a means of enforcing a court's *ne exeat* order, which as a practical matter would otherwise prove unenforceable in most instances. (See Arg. III, below.) And, as in California, it gives local prosecutors a specific remedy they can seek in order to secure a judicial resolution of the case.

Since amicus California accepted its first Hague Convention case in 1989, its has steadfastly advocated

the position that a parent whose child is abducted by the other parent in violation of an express court order prohibiting such conduct has the right to seek return of the child under the Convention. California's long-held view—that a *ne exeat* order confers a right of custody under the Convention—is consistent with the guidance the State Attorney General's Office has provided to local prosecutors throughout the state, and with the guidance provided to state court judges in Hague cases. Hoff, Volenik and Girdner, *Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA, and the Hague Child Abduction Convention*, American Bar Association Center on Children and the Law, Juvenile and Family Court Journal (Spring 1997/Vol. 48, No. 2), p. 10-9. Although a *ne exeat* right is itself a right of custody, not merely something which transforms access rights into custody rights (*Croll*, 229 F.3d at 145 et seq. (Sotomayor, J. dissenting)), amicus' experience is that a *ne exeat* order is typically included in a court order granting custody and access rights in contemplation of the parents' continued residence within the same country. *See, e.g., Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), *Nadarajan M. v. Sandra W.*, No. B155305, 2002 Cal. App. Unpub. LEXIS 10737(Cal. Ct. App. Nov. 20, 2002).

Accordingly, when a child is brought into California in violation of the *ne exeat* rights of a parent in another Contracting State, state and local prosecutors may initiate a Hague Convention proceeding in which a state court determines whether the child in question was wrongfully removed or retained away from the habitual-residence country, and whether the Convention requires the child's return, so that the underlying custody and visitation dispute can be addressed in the appropriate country. Alternatively, when a child is removed from the State in violation of a California court order prohibiting such removal, state prosecutors can help the left-behind parent apply to the haven country for relief under the Convention.

However, if state courts were required to deny a return remedy where a parent has only *ne exeat* rights, the essential reciprocity between Contracting States would be impaired, and California will be less likely to obtain the return of children to the United States.

A. Failure To Enforce Ne Exeat Rights As Custody Rights Under The Convention, As They Are Enforced By Other Contracting States, Would Result In A Lack Of Reciprocity That Will Threaten Prosecutors' Ability To Resolve Parental Child-Abduction Cases

Because California's prosecutors handle both incoming and outgoing international-abduction cases, it has become clear to amicus that principles of comity and reciprocity must be vindicated in order to ensure that the Convention works effectively in cases of children wrongfully removed from California or to California. [3] "[C]omity is at the heart of the Convention." *Miller* v. *Miller*, 240 F.3d 392, 400 (4th Cir. 2001) (quoting *Diorinou* v. *Mezitis*, 237 F.3d 133, 143 (2d Cir. 2001) (internal citations and quotations omitted in original).

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of

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[3] For this reason, California has actively worked to foster such reciprocity. For instance, recognizing that the majority of California cases involve children either taken to or taken from Mexico, the State Attorney General's office has helped organize several Binational Conferences with its counterparts in Mexico, aimed at improving the handling of Hague Convention cases and achieving their expedited resolution on both sides of the border.

> treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.

Factor v. *Laubenheimer*, 290 U.S. 276, 293-294 (1933) (citations omitted).

The argument that a *ne exeat* right confers no custody right under the Convention fails to construe the Convention's "rights of custody" liberally and undervalues the importance of reciprocity in the Convention's implementation. Adopting that argument would undermine the efforts of California prosecutors to obtain the return of children to California under the Convention.

For example, when the California Attorney General receives a Hague application from a mother in Germany claiming that her children have been brought to California by the father in violation of her right of custody, the Attorney General asks the local prosecutor to locate the child and begin a Hague Convention proceeding. See, e.g., *In re Witherspoon*, 155 Cal. App. 4th 963, 969-970 (2007);[4] see also *In re Marriage of Forrest and Eaddy*, 144 Cal. App. 4th 1202, 1208, 51 Cal. Rptr. 3d 172 (2006) (reflecting local prosecutor's involvement). Under the Fifth Circuit's view in this case, if the mother's only claim of custody is based on a *ne exeat* clause, the trial court would be required to find

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[4] In *Witherspoon*, the Hague application was initially directed to the Attorney General. Although the case did not involve a *ne exeat* order, the court did find that the father's removal of the children from Germany was wrongful because it interfered with the mother's jointly held custodial rights, by operation of German law, including the right to determine the childrens' residence. *Id.* at 972.

that such a clause does not confer a right of custody and would be constrained to refuse to order the child returned to Germany—even though Germany itself considers a *ne exeat* clause to constitute a right of custody. *See Bundesverfassungsgericht* [9BverfG] [Federal Constitutional Court] July 18, 1997, 2 BvR 1126/97(F.R.G.); http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&lng=1&conde=338 (INCADAT summary). Thereafter, a California prosecutor assisting a California resident parent with a *ne exeat*-based custody right runs the risk that a German court will be unwilling to return a child because of California's failure to accord reciprocity to Germany when the German parent sought to recover the similarly-situated German child.

Interpreting the term "rights of custody" under the Convention in a manner that is consistent with the views of the United States' treaty partners, as documented in the reports of the Special Commission meetings referenced above and as reflected in the foreign case law, promotes the principles of comity and reciprocity that are crucial to the successful operation of the treaty. In so doing, it furthers the ability of State prosecutors to use the Convention both to recover children wrongfully removed from the State and to return to other Contracting States children wrongfully brought into California.

B. A Restrictive Interpretation Of "Rights Of Custody" And The Resulting Lack Of Reciprocity Would Undermine The State's Significant Interest In The Enforceability Of Its Orders And Judgments

The availability of the return remedy when a child has been removed from the habitual residence country in violation of a parent's court-ordered access and *ne exeat* rights is justified by another good reason: it gives force to court *ne exeat* orders, whereas respondent's

more restrictive approach would often make them ineffective.

In recognition of their importance, state courts often include *ne exeat* provisions in custody and visitation orders. See Cal. Fam. Code, § 3048(b)(2)(C), 3063, 7501; see *Brown* v. *Yana*, 37 Cal. 4th 947, 957, 38 Cal. Rptr. 3d 610 (2006) ("section 7501, fairly read, contemplates that even a parent with sole legal and sole physical custody may be restrained from changing a child's residence, if a court determines the change would be detrimental to the child's rights or welfare").[5] State courts, naturally, expect that these orders will be obeyed and enforced. This expectation is reflected in the fact that parents subject to custody and visitation orders are expressly warned that, if they violate those orders, they may be subject to civil or even criminal sanctions. Cal. Fam. Code § 3048(a)(4); see Family Law forms, n.5. California law, further, provides both civil and criminal contempt proceedings to remedy the willful disobedience of such court orders. See, *e.g.*, Cal. Fam. Law, §§ 290, 1209 *et seq.*; *People* v. *Lindemann*, 8 Cal. App. 4th Supp. 7, 12, 11 Cal. Rptr. 2d 886 (1992). But a court can do little to give effect to these remedies when a parent has left the country in violation of its orders. The parent residing abroad may simply be beyond the court's reach if extradition is unavailable.

The Hague Convention's return remedy, however, provides an appropriate and effective remedy for the

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[5] Standard forms used in custody cases in California contain *ne exeat* provisions that Family Law judges can check to restrict parents' travel with their children. See, e.g., Family Law form 341, Child Custody and Visitation Order Attachment, page 2, par. 6 & 7, http://www.courtinfo.ca.gov/forms/documents/fl341.pdf; Family Law form 341(B), Child Abduction Prevention Order Attachment, http://www.courtinfo.ca.gov/forms/documents/fl341b.pdf Family Law form 355, Stipulation and Order for Custody and/or Visitation of Children, http://www.courtinfo.ca.gov/forms/documents/fl355.pdf (hereinafter "Family Law forms").

breach of a state court's access and *ne exeat* orders. As discussed above, the shared expectations of the Contracting States, reflected in the Special Commission meeting reports and in foreign case law addressing this issue, show that the return remedy was meant to apply to violations of *ne exeat* orders. This expansive interpretation of rights of custody, shared by the Contracting Parties, serves the State's significant interest in enforcement of its orders and judgments. *See Brittain* v. *Hansen*, 451 F.3d 982, 1001-02, quoting *Duranceau* v *Wallace*, 743 F2d 709, 711-12 (9th Cir. 1984) ("California's interest in enforcing its court judgments is significant."). When children removed from the State in violation of its *ne exeat* orders are returned pursuant to the Convention, the State benefits from other countries' recognition and enforcement of those orders: its court's order is enforced, the child is returned so the court can continue to exercise jurisdiction over custody, and the taking-parent's effort to evade the court's jurisdiction and gain some advantage in regard to the child's custody is thwarted. From the State's perspective, it is hard to expect other Contracting States to respect and enforce California's *ne exeat* orders without reciprocally recognizing and enforcing, in the United States, similar orders from other Contracting States.

If a *ne exeat* order does not confer a right of custody, so that a breach of it cannot be remedied by returning a child removed in violation of that order, then a parent may violate that order and take his or her child abroad with impunity. For, as a practical matter, no other established legal mechanism can effectively remedy the situation. By contrast, accepting a *ne exeat* right as a right of custody, the violation of which can be remedied by the return of the child, encourages and promotes the rule of law and gives effect to the Convention's mechanism for enforcing such court orders.

III. IT WOULD CONTRAVENE SOUND PUBLIC POLICY TO TREAT VIOLATIONS OF ACCESS AND *NE EXEAT* RIGHTS SERIOUSLY UNDER CRIMINAL AND DOMESTIC FAMILY LAW, BUT LESS SERIOUSLY IN INTERNATIONAL CASES, ESPECIALLY GIVEN THE CONSTITUTIONAL DIMENSION OF THE PROTECTIONS AFFORDED THE PARENT-CHILD RELATIONSHIP

The violation by one parent of the other parent's rights of visitation can constitute a criminal offense under both state and federal law. In addition, under State family law, a custodial parent's frustration of the other parent's visitation rights can provide a basis for transferring custody of the child to the non-custodial parent. Where the violation of those rights is effected by transporting a child across an international border, perhaps to a haven country many thousands of miles away, it would be inconsistent with the seriousness with which violations of such rights are viewed in other contexts to preclude application of the Convention's return remedy by defining a *ne exeat* right as less than a right of custody.

A. To Allow Violations Of Access Rights To Be Punished Criminally While Disallowing The Convention's More Effective Remedy Of Return Would Undermine The Preference For Resolving Parental Child Abduction Cases Through Civil Means

In California, state and local prosecutors are required to help resolve parental-child abduction cases using both civil and criminal remedies. See Cal. Fam. Code, §§ 3130, et seq., 3455; Cal. Penal Code, §§ 278, 278.5. Criminal prosecution punishes the abducting parent, but does not provide any direct means for recovering a child. Moreover, in parental child abduction cases, the parents and children will continue to have a lifelong relationship with one another and will be profoundly impacted by the prosecution—and even more so by incarceration — of one of the parents.

The family will also be profoundly affected by the impairment of the parent-child relationship that results when one parent, even a custodial one, unilaterally impedes the other parent's access to the child by relocating the child to another country in violation of a court order. Although criminal prosecution appropriately might result in punishing an abducting parent, there is a strong preference for resolving these cases with civil remedies that result in the return of a child. With the power to enforce *ne exeat* orders, the Hague Convention, through its return remedy, provides an effective civil alternative mechanism prosecutors can use to resolve international parental-child abduction cases and thus to fulfill their statutory responsibilities in this area of law.

Absent a return remedy under the Convention, however, state and local prosecutors would have only limited options. As noted, a California prosecutor might charge the taking parent under state law. California Penal Code section 278.5 makes it a crime when a person "takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody, *or a person of a right to visitation* . . . ." (Italics added).

Or, the prosecutor might refer the left-behind parent to federal prosecutors for potential prosecution under federal law. The International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. § 1204(a), provides:

> Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned for not more than 3 years, or both.

The act defines "parental rights" as "rights to physical custody of the child [¶](A) whether joint or sole (*and includes visiting rights*) . . ." 18 U.S.C. §

1204(b)(2) (italics added). Thus, under IPKCA, a parent who moves out of the country in violation of the other parent's visitation rights can be criminally prosecuted. See *United States* v. *Alahmad*, 211 F.3d 538, 541 (10th Cir. 2000).

Despite the availability of criminal sanctions, prosecutors are advised to initiate criminal prosecutions in cases of abductions involving United States treaty partners under the Hague Convention only as a last resort. "Indeed, IPKCA itself specifies that procedures under the Convention 'should be the *option of first choice*'" because they have "'resulted in the return of many children.' Pub. L. 103-173, § 2(b), 107 Stat. 1998 (1999) (emphasis added)." *United States v. Cummings*, 281 F.3d 1046, 1052 (9th Cir. 2002). This policy makes sense because the primary goal in child abduction cases is to reunite the child and both parents and foster a continuing relationship between them, not to punish the taking parent. See Second Special Commission Report, reprinted in 33 Int'l. Legal Materials 225, 249-250 (1994) ("In cases where the main intention was to use a civil action to ensure the return of the abducted child, as envisaged under the Convention, the experts agreed that recourse to criminal procedures ought not to be encouraged. The object was not to punish the abducting parent").

Moreover, "[c]riminal charges under IPKCA (or any other State or Federal statute) may adversely affect return proceedings under the Hague Convention. . . . In Hague proceedings, some foreign judges have been reluctant and others have refused to order a child's return to the United States if the parent's return would result in his or her arrest and attendant inability to participate in civil custody proceedings." *A Report to the Attorney General on International Parental Kidnapping*, April 1999, at 35 (http://www.ncjrs.gov/pdffiles1/ojjdp/189382.pdf).

Even criminal prosecution, whether in the United States or another country, does not always result in the return of the children or reunification with the left-

behind parent. See *United States* v. *Amer*, 110 F.3d 873, 877 (2d Cir. 1997) (despite criminal court order to return children, "[a]t the time of this appeal, the children remain in Egypt"); *People* v. *Lazarevich*, 95 Cal. App. 4th 416, 420 (2001) (despite criminal prosecution in Serbia, the children remained concealed until "Serbian authorities, acting under the direction of President Milosevic, recovered the children in Yugoslavia"). Likewise, a parent such as respondent, who has abducted a child to the United States, could similarly defy a court order to return the child despite being criminally prosecuted. Courts might have the power to order the return of the children as a condition of sentencing, *id.* at pp. 883-885, but the "imposition of such conditions has proven ineffective." *Report to the Attorney General*, at 35.

If California courts are precluded from ordering a child returned under the Hague Convention where the left-behind parent enjoys only a *ne exeat* right, prosecutors may be more likely to use the less desirable avenue of criminal prosecution as a means both to punish the taking parent and to indirectly seek the return of the child. It is illogical, if not contrary to sound public policy, to encourage criminal prosecution and punishment for conduct that is considered, in a different context, too insignificant to mandate a return of the child through the preferable civil remedy.

Clearly, violations of custody and visitation rights may be serious enough offenses to warrant criminal prosecution in both state and federal court. But it makes little sense as a matter of logic or policy to allow a parent to be criminally prosecuted for violating the other parent's *ne exeat* right to determine the country where the child will live, while simultaneously construing that right as so insignificant that it does not constitute a right of custody sufficient to make the Hague Convention's return remedy available in civil proceedings.

B. Disallowing The Convention's Return Remedy For Violations Of *Ne Exeat* Rights Would Be Inconsistent With The Serious Consequences Attendant To Such Violations Under State Family Law

Similarly, in the realm of family law, violations of a parent's visitation rights are viewed as sufficiently serious that "[c]onduct by a custodial parent designed to frustrate visitation and communication may be grounds for changing custody. (*Speelman* v. *Superior Court*, [152 Cal.App.3d 124, 132, 199 Cal Rptr. 784 (1983)].)" *Burchard v. Garay*, 42 Cal. 3d 531, 541 n.11 (1986); see Cal. Fam. Code, 3040(a)(1) ("In making an order granting custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent"). Thus, a custodial parent who frustrates the other parent's rights of access to a child by taking their child abroad in violation of a court order might, under state family law, face the loss of custody of the child and the transfer of custody to the other parent. If access rights are deemed sufficiently important that their breach can give rise to the transfer of a child's custody from the custodial parent to the parent with access rights, then it should be equally possible to secure the return of a child under the Hague Convention when the violation of those rights is accomplished across international borders. Construing the *ne exeat* right as a right of custody gives full effect to the level of importance placed upon a parent's right of access and is consistent with the serious consequences that can follow a violation of that right.

C. Petitioner's Interpretation Of "Rights Of Custody" Is Consistent With The View That The Importance Of The Parent-Child Relationship Warrants Constitutional Protection

The notion that a *ne exeat* right is so insignificant that it does not constitute a right of custody or warrant invocation of the Convention's return remedy is similarly inconsistent with the value placed on the parent-child relationship reflected in attendant constitutional protections. Parents have a fundamental liberty interest in making decisions concerning the care, custody, and control of their children. *Troxel* v. *Granville*, 530 U.S. 57, 66 (2000). This is "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.*, at 56 (citing *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923)). "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' [citation] rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 116 (1996).

Parents with visitation rights have been held to possess a liberty interest in their court-ordered visitation rights, albeit "lesser in magnitude than that of a parent with full legal custody." *Brittain* v. *Hansen*, 451 F.3d at 992; see *Swipies* v. *Kofka*, 419 F.3d 709, 714 (8th Cir. 2005) (non-custodial parent had protected liberty interest in care, custody and management of child); see also *Terry* v. *Richardson*, 346 F.3d 781, 784 (7th Cir. 2003). Moreover, such rights are reciprocal and belong to the children as well as to the parents. *E.g.*, *Suboh* v. *Dist. Attorney's Office*, 298 F.3d 81, 91-92 (1st Cir. 2002); *Bennett* v. *Town of Riverhead*, 940 F. Supp. 481 (D.N.Y. 1996); *Wooley* v. *City of Baton Rouge*, 211 F.3d 913 (5th Cir. 2000); *F.K.* v. *Iowa District Court*, 630 N.W.2d 801 (Iowa Sup. 2001); see also *Troxel* v. *Granville*, 530 U.S. 57, 89-91 (O'Connor, J. dis. opn.).

This is not to say that the constitutional rights of petitioner and his child have been violated in this case. Amicus is mindful of "the Supreme Court's directive to 'avoid constitutional issues when resolution of such issues is not necessary for disposition of a case.'" *Brittain* v. *Hansen*, 451F.3d at 996 (quoting *In re Snyder*, 472 U.S. 634, 642 (1985)). Rather, amicus points out, in connection with the *ne exeat* right and the meaning of the right to custody under the Convention, that "there is a constitutional dimension to the right of parents to direct the upbringing of their children." *Troxel*, 530 U.S. at 56.

This Court has explained that "[t]reaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Asakura* v. *City of Seattle*, 265 U.S. 332, 341 (1924). Moreover,"[t]reaties are construed in the same manner as statutes," *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210, 215 (2d Cir. 1999); and, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' [citation]," this Court is "obligated to construe the statute to avoid such problems." *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001).[6] As discussed above, it is at the very least "fairly possible"—in looking at the intent of the drafters, the case law of other signatory countries, the persuasive arguments of the federal courts in *Furnes* and the *Croll* dissent, and the

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[6] While the Supremacy Clause of the United States Constitution declares that treaties "shall be the supreme Law of the Land[,]" this Court has observed that "[t]here is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution." *Reid* v. *Covert*, 354 U.S. 1, 16 (1957).

concerns raised in amicus' experience—to interpret the Hague Convention's "right of custody" as encompassing the right or rights conferred by *ne exeat* orders. Such an interpretation also would enhance the goal of reciprocity in the treaty's implementation, increase the likelihood of recovering abducted children, and comport with the public policy favoring civil remedies over criminal prosecutions.

It would be anomalous to recognize the constitutionally protected right of a parent to make decisions concerning the care, custody and control of their children, which extends to some degree to parents with visitation rights, yet interpret the terms of the Convention in a way that places out of reach the only effective remedy for violations of those constitutionally protected rights. Interpreting a *ne exeat* right as a right of custody under the Convention is consistent with this Court's directive that a treaty must be construed in a broad and liberal spirit, and best serves not only a parent's liberty interests in court-ordered visitation rights, but the reciprocal rights of a child in the parent-child relationship.

* * * * *

The State's consistent and long-held position has been that *ne exeat* orders confer a right of custody under the Hague Convention and therefore, the Convention's return remedy is available to applicant parents in such cases. This view is consistent with a proper interpretation of the term "rights of custody" in Hague cases, the interpretation adopted and understood by the other Contracting States, and the principles of comity and reciprocity essential to the successful implementation of the treaty. It satisfies the State's interest in the enforceability of State court orders and it promotes the ability of State and local prosecutors to fulfill their statutory responsibilities in international parental child abduction cases.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted

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September 22, 2009

AMICUS CURIAE BRIEF

No. 08-645

In The Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,

Petitioner,

v.

JACQUELYN VAYE ABBOTT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE DOMESTIC VIOLENCE LEGAL EMPOWERMENT & APPEALS PROJECT (DV LEAP), THE BATTERED WOMEN'S JUSTICE PROJECT – DOMESTIC ABUSE INTERVENTION PROGRAMS, INC., THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, LEGAL MOMENTUM, AND THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are organizations combating domestic violence through litigation, legislation, and policy initiatives. *Amici* have extensive experience working with survivors of domestic violence and engaging in legal and policy reform efforts on behalf of them.

Amici are concerned about the detrimental applications of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 (the "Convention") to abused women and children. *Amici* are aware that many children who must return to the country from which they fled are ultimately re-abused or suffer other significant harms. Extension of the Convention's return remedy to non-custodial parents who possess a *ne exeat* order will exacerbate this problem and is inconsistent with the language and purpose of the Convention. *Amici* therefore submit this brief in support of Respondent.

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[1] The identities and interests of *Amici* are described in Appendix C to this brief. The parties have consented to the filing of this brief in letters filed with the Clerk. *See* S. Ct. Rule 37.3(a). No counsel for any party had any role in authoring this brief, and no one other than *Amici* provided any monetary contribution to its preparation or submission. *See* S. Ct. Rule 37.6.

SUMMARY OF THE ARGUMENT

The Court's ruling in this case will have a significant impact on American women fleeing spousal or child abuse with their children. The Convention's original focus – on child abductions by non-custodial parents – has been overtaken by a new reality: primary caretaker mothers fleeing with their children. Because domestic violence and child abuse are at issue in many of these cases, and because *ne exeat* orders are a frequent tool of batterers, the Court's resolution of this case will have a disproportionate impact on battered women and their children.

The Convention's over-arching purpose in reducing child abduction was to prevent harm to children. Indeed, children's interests take priority over the rights of the left-behind parent in numerous provisions. Yet courts frequently interpret the Convention as requiring a child's return even in situations where return will subject the child or the child's mother to the same violence and abuse from which they just escaped. Such returns risk the child's direct abuse, traumatic exposure to the mother's abuse, and/or the devastating loss of the primary caretaker. These results are inconsistent with the aims of the Convention, which explicitly recognizes that some returns are harmful to children and should not be ordered. Despite the Convention's explicit exceptions to return – for example, where there are "grave risks" of physical *or psychological* harm to children (Article 13(b)) – many courts interpret these defenses so narrowly as to render them ineffective.

Extending the return remedy to non-custodial parties who hold *ne exeat* orders, often batterers, will only exacerbate the difficulty abuse victims already face under the Convention and harm children. Such an outcome is contrary to the Convention's language and fundamental purpose. *Amici* therefore urge the Court to affirm the decision below.

ARGUMENT

I. MANY HAGUE CASES INVOLVE MOTHERS AND CHILDREN FLEEING ABUSE

Because a significant proportion of Convention cases now involve primary caretaker mothers fleeing abuse, ordering their return is often harmful to children.

A. Hague Cases Commonly Involve Mothers and Children Fleeing Domestic Violence and Child Abuse

1. Domestic Violence is Frequently Alleged as a Reason for Removal

The international community's need for the Convention was fueled by an idea of a typical parental abduction in which a father who had lost custody abducted the children and sought a more favorable custody determination in another country. Merle H. Weiner, *International Child Abduction & the Escape from Domestic Violence*, 69 Fordham L. Rev. 593, 602-03, 607-09 (2000) (describing "prototype" of

male non-custodial abductor which fueled Congressional ratification and to lesser extent drafting of Convention). To the extent domestic violence was considered at the time, it was primarily in connection with the recognition that abusers often abduct children. *Id.* at 605-10.

The current reality in Convention cases, however, is very different from the original paradigm. Empirical research confirms that 68 to 69 percent of "taking persons" are now mothers, not fathers. Nigel Lowe, *A Statistical Analysis of Applications Made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, at 21, Prelim. Doc. No. 3 (2006) (discussing 2003 data from 58 responding signatory states and 1999 data from 39 states); *see also* Marilyn Freeman, *International Child Abduction: The Effects*, *reunite International Child Abduction Centre* (2006) (study sample consisted of 63 percent female parent abductors). Of these mothers, it appears the majority (84 percent) are sole or joint custodial parents. Lowe, *Statistical Analysis*, *supra*, at 23.

Many of these women are fleeing domestic violence and/or child abuse. Violence against women has been characterized as "a notable risk marker for parental abduction." Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women & Children are Being Returned by Coach & Four*, 13 Int'l J.L., Pol'y & Fam. 191, 193 (1999). Indeed, one study observed, "Family violence is characteristic of most of these families [who experience

international child abduction]. Allegations of spouse abuse, child abuse and serious child neglect are frequent, with many having sought restraining orders or reporting abuse to authorities." Kaye, *supra*, at 193 (quoting Linda Girdner, *et al.*, *International Child Abductors: Profile of the Abductors Most Likely to Succeed,* paper presented at the Second World Congress on Family Law and the Rights of Children and Youth, June 3, 1997, San Francisco, CA). Even though court decisions do not always reflect violence that has occurred – as in this case – one study found that approximately one-third of all published and unpublished U.S. Convention cases mentioned violence within the home. Suddha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction,* 11 Violence Against Women 115, 120 (2005).

Convention contracting states appear to have reached a general consensus that domestic violence is now a leading – if not *the* leading – problem in Convention cases. In the pre-meeting questionnaire preceding the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention, "country after country, including the United States, recognized that domestic violence is frequently raised as an issue by the respondent" in Hague proceedings. Merle H. Weiner, *Half-Truths, Mistakes, & Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the*

Civil Aspects of International Child Abduction, 1 Utah L. Rev. 222, 223 n.5 (2008) (citing Hague Conference on Private International Law, *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, at 309-319, Prelim. Doc. No. 2 (Oct. 2006), *available at* http://www.hcch.net/ ("Collated Responses")).[2]

Domestic violence was explicitly on the agenda of the Fifth Meeting, and both the Special Commission Chair, Justice Catherine McGuinness of the Supreme Court of Ireland, and country representatives expressed serious concern about the way the Convention was "being used by abusive (usually male) parents to seek the return of children and primary carers . . . and that the Convention is moving away

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[2] The Collated Responses indicate the following about the frequency of abductors' reports of domestic violence: Argentina: "often allege these doings"; Canada (British Columbia): "routinely raised"; Canada (Quebec): "increasingly"; Colombia ("almost always"; Ecuador: "often used"; Finland: "quite frequently used"; France: "frequently invoked"; Iceland: "often raised"; Ireland: "used increasingly"; Israel: "often raised"; Netherlands: "frequently invoked"; New Zealand: "often raised"; Poland: "frequent occurrence"; Romania: "frequently invoked"; Slovakia: "raised in almost every case"; South Africa: "vast majority"; Sweden: "quite frequently"; Spain: "[e]very day there are more cases in which international removal of minors is produced as a result of domestic violence"; United Kingdom (Scotland): "growing incidence of such allegations"; United States: "frequently raised". Weiner, *Int'l Child Abduction*, *supra*, at 223 n.5.

from what it was meant to deter." Weiner, *Half-Truths*, *supra*, at 282-83 (quoting Australia's statement in Collated Responses, *supra*, at 458-59).

Thus, because domestic violence is associated with so many Convention cases, and because *ne exeat* orders are particularly likely in abuse cases, *see* Section III.C., *infra*, the resolution of this case will significantly – if not primarily – impact adult and child victims of abuse.

2. Where Mothers are Abused, Children are at Risk

The growing recognition of domestic violence as an issue in Convention cases directly implicates not just adult victims, but also children:

> Children in violent homes suffer increased physical and psychological illnesses that undermine their health, social and emotional development, and interpersonal behaviors. Children exposed to domestic violence are more prone to anxiety, depression, learning disabilities, and delinquency. A high percentage of men who batter their wives also batter their children, but domestic violence is traumatic for children even if they simply witness abuses or live in homes suffused with the tension and fear violence generates. Even toddlers are quite aware of what is going on around them, and often suffer slowed development, sleep disturbances,

> depression, anxiety, and feelings of helplessness and fear as a result.

Lynn Hecht Schafran, *Evaluating the Evaluators: Problems with "Outside Neutrals,"* The Judges' Journal at 10, 13 (Winter 2003) (citations omitted). Where domestic violence occurs, often so does child maltreatment. They co-occur 30 to 60 percent of the time, for a median of 41 percent. Shetty & Edleson, *supra*, at 126. *See, e.g., In re Walsh*, 31 F.Supp.2d 200, 202-03 (D. Mass. 1998), *aff'd in part, rev'd in part*, 221 F.3d 204 (1st Cir. 2000) (describing abusive husband slapping daughter as punishment and punching son for breaking beer bottle). *See also* Interviews 4, 11, and 13 (children's fathers physically abused mothers and children); Interview 14 (children's father attacked mother with gun and sexually abused daughters).[3] Children may be physically hurt when they intervene in their parents' violence. Jeffrey L. Edleson, *Emerging Responses to Children Exposed to Domestic Violence*, National

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[3] As part of a research study for the National Institute of Justice, noted domestic violence researchers Dr. Jeffrey Edleson, Dr. Taryn Lindhorst, and their research team interviewed 22 female victims of abuse who fled across borders with their children. *See* Jeffrey Edleson, *et al.*, *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the U.S. for Safety: A Study of Hague Convention Cases* (Draft Final Report to the National Institute of Justice) St. Paul, MN: University of Minnesota (2009) (hereinafter "*Multiple Perspectives*"). Portions of those interviews are referenced throughout this brief. Complete summaries of cited interviews, which were prepared by Dr. Edleson and his team, are attached as Appendix A.

Online Resource Center on Violence Against Women 2 (Oct. 2006), *available at* http://www.vawnet.org. *See also* Interview 12 (young son unsuccessfully tried to stop father from hitting his mother). And the psychological and emotional injuries to children at all ages, including anxiety, depression and other trauma symptoms, from "merely" witnessing adult abuse, are well-documented. Abigail H. Gewirtz & Jeffrey L. Edleson, *Young Children's Exposure to Intimate Partner Violence: Towards a Developmental Risk & Resilience Framework for Research & Intervention*, 22 J. of Family Violence 151, 151-52, 156 (2007); G. Anne Bogat, *Trauma Symptoms Among Infants Exposed to Intimate Partner Violence*, 30 Abuse & Neglect 109 (2006); *see also* Interview 10 (children were not directly abused but required therapy); Interview 13 (boys returned to father who abused their mother now have psychological issues, including aggression).

Young children – typically found in these cases – are especially vulnerable. Edleson, *Multiple Perspectives, supra* (median age of children in Hague domestic violence cases is six). First, they are more likely to be with their mothers in the middle of an assault. Edleson, *Emerging Responses, supra,* at 3; *see also Tabacchi v. Harrison*, No. 99 C 4130, 2000 WL 190576, at *5 (N.D. Ill. Feb. 10, 2000) (father allegedly shook infant daughter and yelled at wife when she asked him to stop); Interview 11 (young son elbowed in forehead by drunken father). Second, younger children are less emotionally and psychologically resilient. Gewirtz & Edleson, *supra*, at 155-57;

see Weiner, *Int'l Child Abduction*, *supra*, at 627 (discussing author's interview with battered mother in *Prevot v. Prevot*, 855 F.Supp. 915 (W.D. Tenn. 1994)) ("[t]he [2 and 4 year old] children were so traumatized by the family violence that they hardly spoke when they returned to the United States").

Children who both suffer direct violence and witness their mother's victimization often develop the most severe behavioral problems. *See* David Finkelhor, *et al.*, *Poly-victimization: A Neglected Component in Child Victimization*, 31 Child Abuse & Neglect 7, 8-9, 15-16 (2007).

In short, where adult domestic violence is at issue, so is potential physical or psychological harm to children.

3. This Case, Too, Entails a History of Domestic Violence and Alleged Child Abuse

While it is not apparent from the decisions below, like so many Convention cases, this case also involves a history of domestic violence. Ms. Abbott alleged in the Chilean custody litigation that Mr. Abbott physically and psychologically abused her for more than a decade, continuing after their son was born. JA 10. Ms. Abbott documented her "moderate injuries" for the Chilean court by providing a police report and copies of a civil action and criminal court action (in Hawaii) filed against Mr. Abbott. JA 12. Ms. Abbott testified Mr. Abbott also physically and

psychologically abused the boy. JA 10. A psychologist referred by the school testified, "the minor must be protected until it is clear that the father can control himself in conflictive situations." JA 11. The psychologist further testified that, while the "child loves his father," he "continues to show some fear of bewildering reactions thereof, which are largely directed towards the mother, which logically has an effect on the child." JA 36. A neuropsychiatrist, who treated the parties' son for over a year, testified he had a "severe depressive disorder secondary to family abuse that has been going on for a long time," he was "highly irritable," and "has great mood swings." JA 21-23. Ultimately, a report from the Family Orientation and Diagnostic center found Mr. Abbott "represent[ed] no danger to his child" and recommended visitation. JA 12-13.[4]

Mr. Abbott also threatened not to return the boy to his mother. *See* JA 17-21, 37. On one occasion, Mr. Abbott withheld their son for 16 days after Ms. Abbott had allowed him an additional four-day visit not contemplated by the parties' provisional visitation agreement. JA 20-21, 37. Mr. Abbott returned the boy only after *several hours of negotiations with police*. JA 20-21, 37. The *ne exeat* order upon which Mr. Abbott now relies was initiated by Ms. Abbott in response to this incident. *See* Kaye, *supra*, at 194 (noting mothers

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[4] *See* Section I.B., *infra*, for discussion of the frequent failure of family courts to adequately respond to domestic violence and child abuse in custody litigation.

sometimes flee with children to protect them from being kidnapped by their abusive fathers).

B. Abused Women Overseas Often Have Little Alternative to Fleeing with their Children to Escape Abuse

The need to protect their children from violence has been identified as a significant motivator for many mothers who flee with their children. *See* Janet R. Johnston, *et al.*, *Early Identification of Risk Factors for Parental Abduction*, Juvenile Justice Bulletin 3-5 (March 2001), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/185026.pdf (finding domestic violence victims more likely to abduct their children and "more likely to see the abduction as an attempt to protect their children"); Janet R. Johnston & Linda K. Girdner, *Early Identification of Parents at Risk for Custody Violations & Prevention of Child Abductions*, 36 Fam. & Conciliation Cts. Rev. 392, 397-98 (1998). While courts and observers often assume abduction is unnecessary because safety can and should be achieved through the legal process, the realities of domestic violence suggest there are no legal panaceas for abuse. The painful reality is that often the only way to ensure the safety of oneself and one's children is to get completely away – and in most cases women seek to do so by returning home. *See, e.g.*, Interviews

3, 4, 6, 9, 10, 22 (women fled with children to home in U.S.).[5]

Most domestic violence is characterized by the use of violence to control the victim and her life and to deny her autonomy or independence. Evan Stark, Coercive Control: The Entrapment of Women in Personal Life 4-5, *passim* (2007); Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation Assault*, 90 Mich. L. Rev. 1, 54-60 (1991). This dynamic means that when a victim leaves an abuser, or asserts her rights through the legal system, violence often escalates, both in retaliation, and as an intensification of his efforts to maintain control over her. Thus, it is at or after separation that "[a]busive husbands are more likely to seriously harm or kill their wives. . . ." Johnston, *et al.*, *Early Identification of Risk Factors, supra,* at 10; *accord* Mahoney, *supra*, at 5-6 ("At the moment of separation or attempted separation – for many women, the first encounter with the authority of law – the batterer's quest for control often becomes most acutely violent and potentially lethal."); Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and*

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[5] The typical fact pattern in U.S. Hague Convention cases involving domestic violence is, overwhelmingly, one where American mothers remove their children from a foreign country, leave the American children's father behind, and return to the United States. Edleson, *et al.*, *Multiple Perspectives, supra*. Out of the 48 American Hague cases involving domestic violence identified by a prominent researcher in the field, 44 (92 percent) followed this pattern. *Id.*

Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey 37-38, U.S. Dept. of Justice, National Institute of Justice, NCJ 181867 (2000) *available at* http://ncjrs.org/pdffiles1/nij/181867.pdf (termination of relationship was associated with increased violence). Since filing for legal protection is a powerful assertion of autonomy and independence, taking legal action can *itself,* as a significant form of separation, also trigger more violence. Deborah Epstein, *et al.*, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-term Safety in the Prosecution of Domestic Violence Cases,* 11 Am. U. J. Gender, Soc. Pol'y & Law 465, 467-68 & n.4, 476 (2003) (victims "are most likely to be killed while taking steps to end the relationship with the abuser or while seeking help from the legal system"). *See* Interview 4 (after divorce papers filed, father kidnapped son, then attacked mother and son); Interview 12 (after divorce, father repeatedly broke into mother's new home and attacked her).

Separation of the adults also increases the risks to children. Even if an abuser has not previously abused the children, once the mother is no longer accessible or present, the perpetrator's rage and abusiveness can be, and often is, turned against the children:

> Abuse of children by batterers may be more likely when the marriage is dissolving, the couple has separated, and the husband and father is highly committed to continued

> dominance and control of the mother and children. Since . . . abuse by husbands and fathers is instrumental, directed at subjugating, controlling and isolating, when a woman has separated from her batterer and is seeking to establish autonomy and independence from him, his struggle to . . . dominate her may increase and he may turn to abuse and subjugation of the children as a tactic of . . . control of their mother.

Evan Stark & Ann Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 (1) Int'l J. of Health Servs., 97-119 (1988); *accord* Lundy Bancroft & Jay Silverman, *The Batterer as Parent* 154 (2002) ("after separation . . . there are many sound reasons to believe that [risk to children] actually *increases* as a result of the mother's inability to monitor or to intervene in the batterer's parenting and of the retaliatory style common to many batterers after separation"). *See, e.g., Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005) (father killed all three children after protection order awarded to mother although no previous history of violence toward the children); Interview 4 (after separation husband snatched, hid five-year-old boy and then assaulted both mother and child); Interview 6 (after mother required to return children, father abused and neglected them).[6]

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[6] In a recent tragedy in Maryland, a father drowned his three young children during an unsupervised visit, which had

(Continued on following page)

Mothers often resort to fleeing with their children when violence to the children escalates or they sense their lives are in danger. *See, e.g.,* Weiner, *Int'l Child Abduction, supra,* at 627 (describing one mother's reason for fleeing France with her children: "When I caught him standing over my son with his arms raised at him I knew I had to get out."); Paula Lucas, *Help for American Women and Children Abused Abroad,* Domestic Violence Report, 14:6, 81, 89 (Aug./Sept. 2009) (author describes potential order to return as a "certain death sentence"); Interview 17 (victim fled to U.S. after husband's drinking and abuse escalated, he described various ways of killing her, and exhibited suicidal behavior). They also may flee to the United States because their attempts to achieve safety in the host country have failed. *See* Interview 12 (victim fled to U.S. with children after abuser, despite divorce, repeatedly broke into her new home and violently attacked her, and neither the police nor the Red Cross would assist her); Interview 13 (victim fled after court and family development agency failed to intervene leading to increased violence).

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been awarded over the mother's desperate objections. *Maryland v. Castillo,* No. 108119017-22 (Balt. Cir. Ct. filed Mar. 31, 2008) (guilty plea entered Oct. 14, 2009). She begged the court to protect the children because of the father's threat that "the worst thing [he] could do to [her] would be to kill the children and not [her]." Jonathan Bor, "*What Drives Parents to Kill?*," Balt. Sun, Apr. 20, 2008. He later admitted to drowning the children to punish their mother. *Id.*

1. Host Countries Often Lack Adequate Legal Protections

While courts are often reluctant to conclude that other countries may not protect victims of abuse, *see, e.g., Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996), inadequate laws, law enforcement, and social norms often obstruct protections for victims of abuse overseas.

The U.S. State Department's Human Rights Reports document these inadequacies among many signatories to the Convention, including Chile.[7] *See* Weiner, *Int'l Child Abduction*, *supra*, at 624-25 n.139 (noting Reports' documentation of similar failures in other countries including Colombia, Poland, Hungary, Macedonia, Spain, South Africa, and Venezuela). Even in countries with laws on the books, inadequate

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[7] *See, e.g.*, Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Human Rights Reports: Chile (2008), *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119152.htm ("Domestic violence against women remained a serious problem . . . [Additionally], 72 percent of children had suffered some form of violence including psychological abuse."); Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Human Rights Reports: Greece (2008), *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119082.htm ("[The government failed] to provide adequate protection to victims of domestic violence."); Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Human Rights Reports: Mexico (2008), *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119166.htm ("Domestic violence was pervasive and mostly unexposed . . . [s]even states do not criminalize domestic violence, and 15 states punish family violence only when it is a repeated offense.").

law enforcement and longstanding conflicting cultural norms often make them ineffective. *See, e.g.*, Patricia M. Hernandez, *The Myth of Machismo: An Everyday Reality for Latin American Women*, 15 St. Thomas L. Rev. 859, 877 (2003) (although many Latin American countries have adopted domestic violence laws since 1994, "the issue of lax enforcement remains"). For instance, in Mexico,[8] social attitudes and customs are tolerant of violence against women. Mary C. Wagner, *Belem do Para: Moving toward Eradication of Domestic Violence in Mexico*, 22 Penn. St. Int'l L. Rev. 349, 350-54, 367-68 (2003). This both frustrates the Mexican government's efforts to stop domestic violence, and discourages women from seeking protection from local police.[9] Wagner, *supra*, at 365.

Nor is Mexico unique. In *Dallemagne v. Dallemagne*, 440 F.Supp.2d 1283 (M.D. Fla. 2006), a Convention respondent testified that calling the

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[8] Mexico is the Convention signatory country with the highest incidence of reported abductions to the U.S., and thus the Convention country with the largest number of potential petitioners in U.S. courts. U.S. Department of State, *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction*, 5 (2009) (detailing signatory and non-signatory countries and charting rates of abduction).

[9] Just three percent of domestic violence victims seek assistance from Mexico's judicial system, even though domestic violence is reported in one out of three Mexican homes. Yvette Lopez, *Sleeping with the Enemy: Mexico & Domestic Violence, Out for a Rude Awakening or Rising in Time?*, 25 Women's Rts. L. Rep. 1, 7 (2003).

French police to stop her husband's violence was "a joke," because the police would refuse to intervene and tell her to simply "forgive her husband." *Id.* at 1289. *See also* Weiner, *Int'l Child Abduction*, *supra*, at 627 (describing French police's insistence that victim could do nothing to stop her husband's violence, could not change the locks, and could not restrict his access to the children; attorney referred by American consulate also offered no legal avenue to stop violence); Interview 12 (victim hit, raped, and beaten, but refused help by police and Red Cross); Interview 20 (after particularly violent episode, victim called local police who told her she was "crazy" and warned her husband to "guard the[ir] son's paper[s] since he was married to an American woman").

Not surprisingly, victims of domestic violence are more likely to flee with their children "when the courts and community have failed to take the necessary steps to protect them from abuse or to hold the abuser accountable." Johnston, *Early Identification of Risk Factors*, *supra*, at 3; *accord* Weiner, *Int'l Child Abduction*, *supra*, at 628 (if Ms. Prevot could have obtained any financial means to live and any legal protection, such as an arrest of her abuser, "she would have stayed in France and fought for custody there"); Interview 4 (mother fled with children to U.S. after local police told her they could not stop her husband from following and threatening them); Interview 21 (mother fled after police refused to enforce restraining order).

Chile, the country from which Ms. Abbott fled, did not have laws against domestic violence until 1994. Hernandez, *supra*, at 876-77. The law enacted in Chile, however, provides a maximum sentence of just six months imprisonment, regardless of the degree of violence, and Chilean courts rarely impose penal sentences in any event. *Id.*

Such a critique of other countries' inadequate protections for domestic violence victims does not stem from a nationalistic indictment of foreign countries but rather from objective observations about the realities faced by abuse victims around the world. *See Van de Sande v. Van de Sande*, 431 F.3d 567, 570-71 (7th Cir. 2005) (Posner, J.) ("To give a father custody of children who are at great risk of harm from him, on the ground that they will be protected by the police of the father's country, would be to act on an unrealistic premise."). In fact, few if any legal systems have achieved consistent protection for victims of abuse. *See* Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims & Their Children in Hague Child Abduction Convention Cases*, 38 Fam. L.Q. 529, 544 (2004) ("Of course every legal system is imperfect in this regard.").

Courts' weak or unprotective responses to abuse victims are often particularly pronounced in the custody litigation context. A growing body of research has documented family courts' surprisingly frequent grants of unsafe access, and even child custody, to abusive fathers. *See* Joan S. Meier, *Domestic Violence Child Custody and Child Protection: Understanding*

Judicial Resistance and Imagining the Solutions, 11 Am. U. J. Gender, Soc. Pol'y & the Law 657, 661-62 & n.19 (2003) (survey found American trial courts awarded sole and joint custody to alleged and adjudicated batterers more often than not); Peter G. Jaffe, *et al.*, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes,* 54 Juv. & Fam. Ct. J. 57-65 (2003) (describing multiple misconceptions which result in family courts' inadequate responses to abuse). Similar trends are being documented in other countries as well. *See, e.g., Failure to Protect? Domestic violence and the experiences of abused women and children in the family courts,* Women's Aid, Nov. 11, 2003, *available at* http://www.womensaid.org.uk/domestic-violence-articles.asp?section=00010001002200020001&itemid=1194&page=2 (in 2003 study of 178 shelter organizations in England and Wales, respondents reported 101 children were given to abusive fathers by courts; only 3 percent of respondents thought appropriate measures are taken to ensure safety of child and resident parent in most custody/visitation cases involving domestic violence).

2. Legal Protections or Orders Often are Ineffectual

Even where courts issue protective orders, they often fail to work. As leading commentators have noted, "[a]busers flout court orders." Bruch, *supra*, at 544; *accord* Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits,* NIJ Research Report 24 (1996) (60 percent of women with

protective orders were subjected to at least one violent episode in following year); Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims, in Do Arrests and Restraining Orders Work?* 233 (Eve S. Buzawa & Carl G. Buzawa eds., Sage 1996) (women with children who had protection orders 70 percent more likely to face violence than women without children).

Courts considering the return of children to countries where there is a serious risk of abuse frequently seek to reduce the risks to adult and child victims by issuing orders to the abuser, based on his "undertakings" or promises of good behavior. *See, e.g., Blondin v. Dubois (Blondin II)*, 189 F.3d 240, 242, 249 (2d Cir. 1999) (affirming district court's determination that returning children would expose them to grave risk of physical abuse but remanding for "more complete analysis of the full panoply of arrangements that might allow the children to be returned"). Yet research indicates violent parents virtually never comply with Convention undertakings orders regulating their conduct toward the other party. The leading study of the efficacy of undertakings found that protective undertakings prohibiting violence between the parties were consistently violated. reunite Research Unit, *The Outcomes for Children Returned Following an Abduction*, 31-32 (Sept. 2003) (undertakings specifically related to violence were broken in 100 percent of cases, and undertakings overall, regardless of activity restricted, were violated in two thirds of cases). Thus, "[w]here a grave risk of

harm has been established, ordering return with feckless undertakings is worse than not ordering it at all." *Simcox v. Simcox*, 511 F.3d 594, 608 (6th Cir. 2007); *see also Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000) (reversing return order where father's undertakings and possibility of Irish court orders did not mitigate the grave risk of harm).

3. American Women and Children Victimized Overseas Are Particularly Vulnerable to Isolation and Lack of Social Supports

Abused mothers overseas often flee to the United States because they lack adequate support networks to take care of themselves and their children in the foreign country. "Any lack of support in the country of habitual residence will be exacerbated if [a mother] is experiencing violence." Kaye, *supra*, at 194. Language barriers and cultural differences limit women's access to help. *See* Paula Lucas, Domestic Violence Rep., *supra* (abuse victims living in foreign country face additional barriers including being undocumented, lacking access to passports or travel documents, or being subjected to travel bans by the abuser). Financial barriers – which are often exacerbated when an American woman overseas is financially dependent on her abusive husband and cannot work in the country – can be especially significant in this context. *See, e.g.*, Paula Lucas, *Founder's Story*, Americans Overseas Domestic Violence Crisis Ctr. (2009), http://www.866uswomen.org/Founders-Story.

aspx (professional woman had no access to funds and forged husband's signature on check to get out of country); Weiner, *Int'l Child Abduction*, *supra*, at 627-28 (abuser in France transferred all money to his sole account, and hid his wife's and children's identification papers, passports, and birth certificates). Even a working knowledge of the language may not be enough to adequately assert legal rights or navigate the channels of a foreign legal system. *See* Johnston & Girdner, *supra*, at 403-04 (concluding domestic violence victims who feel disenfranchised from legal system are more likely to flee with their children).

II. DESPITE THE CONVENTION'S UNDISPUTED PURPOSE OF PROTECTING CHILDREN, AND EXPLICIT PROVISIONS INTENDED TO AVOID RETURNS THAT ARE HARMFUL, IN PRACTICE THE CONVENTION OFTEN FAILS CHILDREN AT RISK

A. The Convention's Focus is on the Interests of Children

The Convention expressly proclaims: "[T]he interests of children are of paramount importance in matters relating to their custody." Convention, art. 1. The Convention's official history records that it was "inspired by the desire to protect children and should be based upon an interpretation of their true interests." Elisa Pérez-Vera, Explanatory Report: Hague Conference on Private International Law, 3 Acts and Documents of the Fourteenth Session (Child

Abduction) (1980), ¶ 24 (hereinafter the "Explanatory Report"), *available at* http://www.hcch.net/index_en.php?act=publications.details&pid=2779.[10]

1. The Remedy of Return is Available *Only* to the Custodial Parent

The Convention provides for the return of children "*wrongfully* removed to or retained in any Contracting State." Convention, art. 1 (emphasis added). A removal or retention is to be considered "wrongful" where "it is in breach of *rights of custody* . . . under the law of the State in which the child was habitually resident immediately before the removal or retention." *Id.* art. 3 (emphasis added). "Rights of custody are distinguished from *rights of access*. . . . The Convention provides recourse in the event a child is removed from a[ ] habitual residence in breach of access rights, but those remedies *do not* include an order of return. . . ." *Croll v. Croll*, 229 F.3d 133, 137 (2d Cir. 2000) (emphasis in original).

The treaty's focus on "wrongful" removals and the grant of a right of return *only* for those removals interfering with "rights of custody" was driven by a specific vision of what children need: their primary caretaker. Return was the priority because it aimed

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[10] The Pérez-Vera Explanatory Report is the official commentary to the Convention. *See* Hague International Child Abduction Convention, Text and Legal Analysis, 51 Fed. Reg. 10,498, 10,503 (Mar. 26, 1986).

to remedy "the traumatic loss of contact with the [custodial] parent who has been in charge of his upbringing." *See* Explanatory Report, *supra*. The Convention's *refusal* to denominate absconding by the *custodial* parent as "wrongful" naturally flowed from this view of children's interests – because requiring return in that instance would detrimentally subject the child to the very same "traumatic loss of contact" with his or her caretaking mother. While a litigant who has violated a court order may not be viewed favorably by courts, fidelity to the Convention requires recognition of its policy choice – which puts the interests and needs of children above the injured rights of the parent and the court whose order has been violated.

2. Even the Custodial Parent's Return Remedy is Subject to Defenses in the Interest of the Child

The Convention's drafters also recognized that even when the petition for return was filed by a *custodial* caregiver, children's "best interests" would not always be protected by return:

> [T]he Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby

> the interests of the child are stated to be the guiding criterion in this area.

Explanatory Report, ¶ 25. Thus, even where the petitioning parent does hold rights of custody (and is exercising them), and the abduction violates a custody order, the Convention contemplates exceptions to the usual return order in several situations. Among these are cases where there is "a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation," Convention, art. 13(b); and cases where "the return is not permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms. *Id.* at art. 20.[11] Thus, the Convention's core purpose – to protect children's interests – "[would] not . . . be furthered by forcing the return of children who were the direct or indirect victims of domestic violence." *Simcox*, 511 F.3d at 604-05 (citing Merle H. Wiener, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention On the Civil Aspects of International Child Abduction*, 33 Colum. Hum. Rts. L. Rev. 275, 330, 352-53 (2002)).

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[11] Additional exceptions to the return remedy include Article 13 (no return if mature child objects), and Article 12 (no return if child is settled for more than one year in new environment). In each of these instances, a custodial parent's legal rights may have been violated, but the Convention puts the child's well-being ahead of vindication of either those rights or the original court's order.

The adoption of these exceptions to the custodial parent's right of return reflected a "major drafting compromise" between delegates who feared a "public policy defense" to treaty obligations would create too large a loophole to the return mandate and others who felt a blanket return mandate would be harmful to children. Bruch, *supra*, at 531. The specific defenses in Articles 13 and 20 were intended, *inter alia*, to provide protection for adult and child victims of domestic violence. *Id.* Indeed, the language "or otherwise place the child into an intolerable situation" was specifically inserted into Article 13(b) to ensure that return would not be mandated where a child's *mother* was being abused *but the child was not*. *See* Weiner, *Half-Truths, supra,* at 292-93 (noting Commonwealth Secretariat representative J. David McClean, who helped draft the Convention, said during the Fifth Meeting of the Special Commission to Review Operation of the Convention, the "phrase 'intolerable situation' had been added to provide flexibility and to include an exception for domestic violence victims"). As the Explanatory Report says, "the interest of the child in not being removed from its habitual residence ... gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation." Explanatory Report, ¶ 29.

B. Many Courts are Reluctant to Apply the Defenses to Return

Despite the foregoing provisions, many courts seem to presume that "a decision to return a child is a

'good' decision *per se*." Kaye, *supra*, at 196. As a leading commentator characterizes the situation, "courts' appropriate concern that the Convention's exceptions not be permitted to swallow the return rule has sometimes developed into an improper disregard for the Convention's intended protections against danger." Bruch, *supra*, at 535.

Courts have invoked a number of narrowing principles in declining to apply the "grave risk" defense.[12] Most commonly, courts fail to recognize abuse of a child's mother as indicative of grave risk of "physical and psychological harm" to the child or an "intolerable situation" under Article 13(b). For instance, in *Tabacchi*, the court heard evidence Mr. Tabacchi had thrown objects at Ms. Harrison, slapped her, choked her in front of the baby while she was driving, punched her in the head, caused her a black eye and loosened teeth, all inflicting post traumatic stress disorder. 2000 WL 190576, at *1, *3, *7. Nonetheless, the court concluded this evidence did not prove grave risk of either physical or psychological harm to the baby in the future. *Id.* at *13. The court assumed there would be no further abuse of the mother and therefore the child would not be exposed

[12] Article 20 is broader than Article 13(b), but it has been invoked very infrequently and is successful even less often. *See* Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. Rev. 701, 705, 718-720 (2004) (quoting commentators who have stated that "article 20 has 'nearly faded without a trace'") (citation omitted); Edleson, *Multiple Perspectives*, *supra* (Article 20 is asserted in less than 15 percent of U.S. Hague cases involving domestic violence).

to further violence. *Id.* at *13-14. *See also Aldinger v. Segler*, 263 F.Supp.2d 284, 289 (D.P.R. 2003) (violence between adults does not implicate children); *Belay v. Getachew*, 272 F.Supp.2d 553, 560 (D. Md. 2003) (asserting abuse "will never occur again" because parties are now divorced); *Dalmasso v. Dalmasso*, 9 P.3d 551, 558-59 (Kan. 2000) (returning children despite father allegedly threatening mother's life, attacking her in front of the children, hitting and kicking her, pulling her hair); *In re A.V.P.G.*, 251 S.W.3d 117, 128 (Tex. App. 2008) ("Even with allegations of physical abuse to the spouse, grave risk is not proven where there is no evidence that the non-abducting party physically abused the children.").

Some courts even fail to treat evidence of child abuse as indicative of grave risk to the children. *See, e.g., Dalmasso*, 9 P.3d 551 (father used belt on children if they spoke at meals).

Other courts reject evidence of abuse as improperly inviting a re-determination of custody. *See Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 850 (Ky. Ct. App. 1999) (despite evidence Mr. Janakakis slapped their young daughter on the back and had pulled Ms. Janakakis-Kostun's hair so violently she was hospitalized for severe neck injuries, court held Article 13 "must be narrowly construed" and treated abuse evidence as "more closely akin to that which might be relevant in a custody proceeding"). *See also Mendez Lynch v. Mendez Lynch*, 220 F.Supp.2d 1347, 1364 (M.D. Fla. 2002) ("[t]he exception for grave harm to the child is not license for a court in the

abducted-to country to speculate on where the child would be happiest") (internal quotations omitted).

Third, many American courts refuse to apply the defense unless respondents can prove a negative: that courts of the habitual residence are "unable" or unwilling to protect them from abuse. *See, e.g., Friedrich*, 78 F.3d at 1068 (stating "that courts in the abducted-from country are as ready and able as we are to protect children"); Kaye, *supra*, at 198 (noting that many courts feel it is offensive to presume foreign courts are incapable of protecting abuse victims). This position, however, is inconsistent with the often inadequate legal responses to domestic violence in many countries. *See* Section I.B., *supra*; *Van de Sande*, 431 F.3d at 570-71 (criticizing and rejecting *Friedrich* standard); *Baran v. Beaty*, 526 F.3d 1340, 1347 (11th Cir. 2008) (same).

Fourth, courts often rely on "undertakings" which are largely unenforceable, to purportedly alleviate the risks to the children and mother upon return. *See, e.g., Blondin II*, 189 F.3d at 242, 249 (regardless of evidence of danger, Second Circuit felt "every effort" should be made to honor return mechanism. . . ."). As noted in Section I.B.2., such undertakings are largely futile and even deceptive – as abusers typically fail to comply with them.[13]

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[13] The Australian Law Reform Commission has stated that the lack of enforcement mechanism for undertakings allows the Convention to be "misused by men as a means of exercising

(Continued on following page)

The foregoing examples suggest that while the Article 13 grave risk/intolerable situation defense is the most frequently asserted defense in Convention cases involving domestic violence, it is rarely successful. Dr. Edleson's research indicates the grave risk/intolerable situation defense has been asserted in more than 80 percent of Convention domestic violence cases, but it has been successful less than a third of the time. Edleson, *Multiple Perspectives*, *supra*.

Amici's own survey of published appellate decisions involving the Convention and domestic violence found that of 27 trial courts in which the abductor alleged domestic violence and grave risk/intolerable situation, 20 (74 percent) ordered return. While 10 (50 percent) of these were reversed on appeal, appellate courts also reversed 4 of the 7 no-return cases. Appellate courts thus encouraged or required return in 8 (40 percent) of the 20 cases.[14] Together these data indicate domestic violence and child abuse defenses are failing far more than they succeed. While appeals are sometimes successful, it is the rare litigant who can afford an appeal. Thus, even now, the abuse victim who flees to the United States faces significant

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continuing power over their partners." Australian Law Reform Commission (1994) *Equality Before the Law: Justice for Women*, Rep. No. 69 pt. I, § 9.45, Sydney.

[14] A complete list of the surveyed cases is attached as Appendix B.

hurdles in remaining safe and keeping her children safe under the Convention.

III. EXTENSION OF THE RETURN REMEDY TO HOLDERS OF *NE EXEAT* ORDERS IS INCONSISTENT WITH THE CONVENTION'S INTENT TO PROTECT CHILDREN

Unfortunately, extension of the return remedy to non-custodial parents with a *ne exeat* order would exacerbate the problems faced by abused women and children. This outcome would contravene the core purpose and dominant value of the Convention: the protection of children.[15] Convention, preamble, art. 1; Explanatory Report, ¶ 24.

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[15] Indeed, well-established U.S. public policy shares this focus on protecting children and embodies the fundamental freedoms and human rights principles described in Article 20. *See, e.g.*, Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA") § 208 cmt. (1997) ("Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal"); 28 U.S.C. § 1738A(c)(2)(C) (2000) (providing exception to "home state" jurisdiction if "it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse"); 18 U.S.C. § 1204(c)(2) (1994) (federal provision criminalizing child abduction provides defense for fleeing domestic violence); Sense of Congress Respecting Child Custody Determinations, H.R. Rep. No. 101-737 (1990) ("for purposes of determining child custody, credible evidence of physical abuse of one's spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse"); Battered

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A. *Ne Exeat* Orders are Often a Tool for Batterers

Batterers commonly use custody litigation and the children themselves to maintain control and restrict their ex-partner's autonomy and independence.

> When a couple divorces, the legal system may become a symbolic battleground on which the male batterer continues his abuse. Custody and visitation may keep the battered woman in a relationship with the battering man; on the battleground, the children become the pawns. Studies of custody disputes indicate that fathers who battered the mother are twice as likely to seek sole physical custody of their children than are nonviolent fathers . . . .

Report of the American Psychological Association Presidential Task Force on Violence in the Family, Violence and the Family 40 (1996).

Ne exeat orders – which restrict the other parent's ability to leave the jurisdiction with the children – are an especially apt tool for batterers to achieve this end. *See* Weiner, *Navigating*, *supra*, at

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Immigrant Women Protection Act of 2000, § 1503, Pub. L. No. 106-386, 114 Stat. 1464 (amending various sections of 8 U.S.C.) (allowing battered immigrant self-petitioners to claim lawful permanent residence status in the United States with their children instead of having to go abroad, where they are at risk, to get a visa).

330 ("[t]he remedy of return is particularly unjust in the subset of cases where the sole basis for returning the child is a *ne exeat* clause . . . [such an order] may condemn the [primary caretaker] mother to a life of fear and danger").

In the non-Convention case context, relocation restrictions in custody litigation often serve as a means for abusive parents to cement their control over the abused spouse and restrict her or his freedom to leave. Relocation cases serve as a

> microcosm of the broader domestic violence dynamic. Moveaway restrictions give violent men the power to prevent their ex-partners from escaping and to continue controlling essential aspects of their lives after separation and divorce. Batterers use social isolation to maintain their power over their intimate partners. Moveaway restrictions often prevent custodial mothers from returning to their families of origin for support and protection . . . [and] prevent custodial mothers from moving to take new jobs or to continue their educations. . . . Moveaway restrictions allow batterers to use the legal system to . . . continue their domination through control of the children.

Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence,* 46 U. Kan. L. Rev. 433, 450-51 (1998). Thus, "abused women are likely to be overrepresented in relocation custody cases." *Id.* at 437.

It should then come as no surprise that abusers also frequently use the Convention to intimidate their victims, maintain control over them, or gain financial advantage. Weiner, *Half-Truths*, *supra*, at 282; *see also* Bruch, *supra*, at 540-41; Interview 10 (abusive husband threatened to "use the Hague" if wife did not return with their children to his foreign home by certain date and slammed her head against wall before she left). This kind of misuse of the Convention will almost certainly increase if a return order becomes available to a parent whose claim to custody is weak on the merits, such as a non-custodial "rights of access" parent relying on a *ne exeat* order. Bruch, *supra* at 541.

B. Requiring Returns in More Domestic Violence/Child Abuse Cases will Increase Harm to Children

Return orders in cases such as this threaten children's well-being in at least three ways. First, if for her safety the mother cannot return with the children, the children will be removed from their primary caretaking mother in order to fulfill the return order. *See* Interview 13 (victim describes how six police officers removed her young children); Interview 14 (victim describes police removing her children from her home). The loss of their mother would be traumatic to most children, especially young ones.

Second, when the mothers return with their children, as most do, many face the risk of severe harm or even death. *See, e.g.*, Paola Totaro, *Following a court order killed her*, Sydney Morning Herald, May 4, 2009, http://www.smh.com.au/world/following-a-court-order-killed-her-20090503-ard1.html (describing mother who complied with Hague return order and was then murdered by her ex-husband after her pleas for police protection were rebuffed). *Cf.* Lucas, Domestic Violence Rep., *supra* (describing return order in her case as "certain death sentence"). There can be no doubt that extreme violence against or murder of one's mother would be profoundly traumatizing and devastating for children.

Third, in many return cases, not surprisingly, when the abducting mother returns, custody is reversed and awarded to the father who abused the mother and sometimes the children.[16] *See, e.g.*, Interview 7 (two sons have not had contact with mother for over a year); Interview 9 (father who threatened to kill mother now has sole custody, mother has visitation with children three weeks per year but previously went two years without seeing them). The harms to such children are twofold: (i) they are devastated by the loss of their primary caretaker

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[16] *But cf.* Weiner, *Int'l Child Abduction*, *supra*, at 620-23 (pointing out that if abduction protects children from abuse or preserves a mother's life, it is probably protective, and not destructive, to the children).

mother;[17] and (ii) they are now in the custody of a father who is at least emotionally abusive and a high risk for child abuse. *See* Interview 4 (children abused by father after return). *See also* Bancroft, *supra* ("With rare exceptions, it is not in children's best interests to be placed in the custody of a battering father. . . . [C]ustody and visitation planning should treat security for children as a top guiding principle.").

Finally, even if mothers retain custody and are not killed, but are "merely" subjected to ongoing abuse, the children are likely to be exposed to the physical and psychological risks associated with exposure inter-parental abuse and parenting by a highly stressed mother who is not safe. *See* Section I.A.2., *supra*. While courts sometimes assume such abuse will cease once the parties are separated or divorced, *see Tabacchi* and *Belay*, this assumption reflects a misconception that abuse ends when the

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[17] "All of our work shows the centrality of the well-functioning custodial parent-child relationship as the protective factor during the post-divorce years. When courts intervene in ways that disrupt the child's relationship with the custodial parent, serious psychological harm may occur to the child as well as to the parent." Judith S. Wallerstein and T. J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 Fam. L.Q. 305, 311 (1996). In one published decision, the court held that loss of the child's primary bond with his mother would constitute a grave risk of harm and denied return. *Steffen v. Severina*, 966 F. Supp. 922, 928, 930 (D. Ariz. 1997). In another, the court ordered return despite such a finding. *Jaet v. Siso*, No. 08-81232-CIV, 2009 WL 35270, at *6-8 (S.D. Fla. Jan. 5, 2009).

relationship ends – an assumption which is belied by the persistence of abusive individuals' coercive control and the prevalence and severity of separation assault. *See* Section I.B., *supra*.

These outcomes are not required by the Convention's language and are contrary to its purposes. The Convention's focus on the protection of children, especially in light of batterers' misuse of *ne exeat* orders, should inform the Court's determination of the question before it in this case.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to affirm the decision below.

Respectfully submitted,

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APPENDIX A

Cited Interviews with Domestic Violence Victims Involved in U.S. Hague Cases[1]

Interview 3 – Heather and David

Heather, a U.S. citizen, moved to northern Europe with her husband David and daughter while pregnant with her son. Once abroad, David became increasingly depressed and suicidal after moving from job to job. Two years later, his depression and the violence came to a head, and he made a major threat to kill the entire family. The violence in the relationship escalated after that, including an argument where David hit and kicked Heather in front of their daughter. David also made threats to Heather's parents when the family was visiting the U.S. a few months later. Soon thereafter, David returned to northern Europe while Heather stayed with her children in the U.S.

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[1] These 14 interviews were among 22 conducted in 2009 by noted domestic violence researchers Dr. Jeffrey Edleson, Dr. Taryn Lindhorst, and their research team. The interviewees provided their stories confidentially. For convenience, however, pseudonyms have been used here. The research team's interviews are included in the forthcoming report *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the U.S. for Safety: A Study of Hague Convention Cases*. *See* Jeffrey Edleson, Taryn Lindhorst, *et al.*, *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the U.S. for Safety: A Study of Hague Convention Cases* (Draft Final Report to the National Institute of Justice) St. Paul, MN: University of Minnesota (2009).

David then filed a Hague petition against Heather. She was served a few months after he left, and the judge ordered the children be returned to northern Europe two months later. Heather returned with her children but did not have anywhere to go. Custody had not yet been established, and so she stayed with the children in a local shelter. Heather received public assistance as, not being a citizen, she could not work. During this time, her husband had visitation with the children. After several months, immigration served her and her children with a deportation notice to return to the U.S. They have been living in the U.S. since then. A year later, the interviewee obtained sole physical custody of the children but still has joint legal custody with her abusive ex-husband who lives in northern Europe.

Interview 4 – Catherine and Jack

Catherine, a U.S. citizen, married Jack, from a European country, and had two girls and boy with him. When her youngest child was two years old, Catherine began to work a few hours per week outside the home. Jack became jealous and verbally abusive. Catherine asked him to seek psychiatric help at which time he was diagnosed with a bipolar disorder. When Jack would take his medications, he would be okay, but when he stopped the medication, he would become depressed and begin verbally attacking her and the children. After several attempts to change his behavior, she filed for a divorce (10 years after their marriage).

The day he was served with the papers, Jack took their son (five years old at the time) and hid him in another relative's home. Catherine found her son, and in trying to take him back home, she and her son were physically assaulted by Jack. She took all three children and went to the home of a friend-of-a-friend. The local court gave her temporary custody of the children.

When she enrolled the children in a new school, Jack discovered their whereabouts and began stalking Christine and the children, threatening her and telling her he would never let her leave him. Christine contacted the police, but they said they could not stop him from following and threatening them. She had no money, and nowhere to live. She spoke with her local attorney and U.S. embassy staff, both of whom said they thought Christine should return to the U.S.

She left for the U.S. about two months later. Three months after that, Jack was granted custody of the children, saying that Christine had violated the custody agreement by leaving the country. Jack filed a Hague petition against Christine six months later. The U.S. court ruled that Christine's children had to return to Jack, and her appeal failed. After being in the U.S. for a year, Christine's children were returned to her abusive husband. They have experienced physical abuse from him since their return. Christine has returned to Europe and is continuing her efforts to win back custody. Currently, she has custody of her oldest daughter, and the two younger children are

with her abusive husband. Jack has contested the divorce, so they still remain legally married.

Interview 6 – Sarah and Miguel

Sarah moved with Miguel, her Latin American husband, to a Latin American country. Miguel was from a very influential and political family in that country. Over several years, Sarah endured economic control, verbal abuse, physical abuse, and ongoing conflict in the marriage. Eight years later, Miguel left and went to India (with another woman) without telling Sarah. Soon after this, Sarah and her two sons left to go to the southern U.S., where they had arranged for a place to stay through a friend.

Sarah and her children took a boat to another Latin American country and then flew to the U.S. Several months later, Sarah's pastor from the Latin American country from which she had come told her that he had been subpoenaed and that her husband was looking for them. Sarah then went to stay in a domestic violence shelter, and soon after that filed for divorce.

A year after leaving, Sarah was served with Hague papers. The case went to trial several months later, and the children were returned to Miguel. Sarah then learned that Miguel had filed criminal kidnapping charges against her for leaving with her children. In the Hague case, the federal judge ruled that those charges should be dropped.

Sarah returned to the Latin American country to be with her children and began to have some limited, supervised visitation with her sons. A few months later, Sarah learned that the kidnapping charges had not been dropped. She began battling custody and property issues in family court and kidnapping charges in criminal court.

Six months later, Sarah was awarded custody of the boys again, but the order was reversed one month later due to a "legal technicality." She had to return to court to turn the boys over to their father three months later. At the hearing, she brought a representative from the U.S. Embassy to court and she was able to keep her children. Miguel was awarded supervised visits.

By that point, there was also documented neglect of the children and abuse directed to the oldest son by Miguel. Sarah continued to fight for Miguel to have no visitation rights to the children because she was deeply concerned for their well-being. Two years later, Sarah got permission from the local court to take her children to the U.S. for one month. Just before leaving, the criminal court dropped the charges against Sarah, said she was a mother protecting her children from harm, and recognized she had fled because of abuse.

Sarah and her sons faced many obstacles to getting out of the country, but were finally able to leave. Sarah's sons had contact with Miguel via email until the last six months before they left. Sarah is

now in hiding with her sons in the U.S., and Miguel has posted her children as "missing" even though he has their email addresses and has not made contact with them.

Interview 7 – Diane and Philippe

Diane, U.S. citizen, married Philippe, from northern Europe, in the US, and they moved abroad together. They had three children together. When the youngest was a year old, Diane's grandmother became ill with cancer and Philippe encouraged her to go to the U.S. to care for her grandmother. Within a week, Diane and her oldest child came to the U.S. while Philippe remained abroad with her two sons.

Being away from her husband, Diane began to realize how manipulative and controlling Philippe's behavior was. While she was with her family in the U.S., Philippe repeatedly called Diane to check on her and her daughter's whereabouts and sent the police to check on where they were. During this time, Diane also became increasingly aware of how isolated she and the children were in their life abroad. For example, Philippe would not let Diane go out except to go to work, and he had insisted that the family move to a very remote area of the country.

One day, Diane's mother took her to social services where she saw a brochure entitled, "It Shouldn't Hurt to Go Home." Diane saw her own relationship in the description of abuse, which was the first time she really understood that she was in a

domestic violence situation. At this time, Diane was planning to return abroad, and she began to try to contact social services there for support, including a women's aid domestic violence shelter. They originally said they would help her, but then later refused and said they needed to prioritize assisting local women. During this time, Diane also learned that Philippe had not completed Diane's immigration paperwork accurately so she could no longer get back into the country.

A year later, her husband filed a Hague petition against her. She was advised by her attorney that she would have to go abroad and fight for her children in local courts. In the Hague proceeding, Diane agreed to a "voluntary return" as she wanted to demonstrate that she was not in any way trying to abduct her child. She returned and has been living there ever since. Meanwhile, Diane has not seen her two sons in three years and has not had contact with them in more than a year. Philippe is not in any kind of regular contact with Diane's daughter (who is living with Diane). She is continuing to fight for custody/visitation for her sons in local courts abroad.

Interview 9 – Janet and Marco

Janet, a U.S. citizen, married Marco, a southern European-American, and they had two children. When the youngest was two, the family moved from the U.S. to another country. Marco immediately began to have a hard time mentally.

Once they were abroad, Janet was very isolated. She was not allowed to drive or do anything on her own, and Marco controlled all of the family finances. Marco would also consistently call Janet derogatory names. Two years later, Janet got a job outside the home. At this point, the jealousy, resentment, and name-calling by Marco increased.

Soon thereafter, he attacked Janet in front of the children, who were then four and six years of age. In this incident, Marco pushed her down into the bathtub, cursed at her, called her names, and threatened to kill her. Several months later, Janet's brother and sister-in-law offered to help her financially if she wanted to come back to the U.S. She returned to the U.S. with her children and filed for divorce.

A few months later, Marco filed a Hague petition against Janet. At that time, the federal court judge ordered the children be returned to the other country. During the court case, there was information presented from a school psychologist that there was possible sexual abuse of the daughter by Marco. However, the judge insisted that this was not a "grave risk" as the children were not going to a war zone. A month after filing the Hague petition, local courts in the other country gave Marco sole custody of the children and Janet had no contact with her children for six months.

Then, in the divorce proceedings, the judge ordered that the children have summer visits

(approximately two months) and Christmas visitations with Janet. Seven years later, Janet's ex-husband took her to court for custody again. Marco wanted to cut off the children's visits to the U.S. and get 10 years of back child support from her. In that court decision, the judge ordered that the children would have only three weeks per year, in August, in the U.S. with their mother, beginning that year. Janet did not see her children for two years. Janet was able to see both of the children the following year and her daughter stayed with her for three months. She still is not able to have regular phone contact with her children who are still living in the other country with her abusive ex-husband.

Interview 10 – Linda and Ali

Linda married her Middle Eastern husband, Ali, and immigrated with him to another country the next year, where she became a citizen. Linda is a fluent speaker in the language of the other country, but is not a fluent writer of it. They had two boys. Ali had an unstable work history and amassed over $100,000 in debt because he had not paid bills, but Linda did not know this.

After years of a deteriorating relationship in which Linda reports that he was very controlling, Ali became physically abusive. He hit Linda with a baseball bat, and tried to push her out of a speeding car. Linda wanted to return to the U.S. and to get a divorce. After receiving the divorce papers, Ali

obtained a restraining order so she could not leave the other country with the children.

A year later, he agreed to allow her to visit her family in the U.S. with the children, but said he would use Hague if Linda had not returned by August. Before she left, Ali physically abused Linda again by slamming her against a wall which left her with a head wound. She went to the U.S. along with her children to be with her father.

Two months after the self-imposed deadline, Ali filed the Hague petition on the same day she filed for legal custody and a temporary separation from him. The Hague petition judge said the jurisdiction was the U.S. because Linda was held against her will in the other country. Her case was reversed on appeal, and she was told she had 20 days to return the children to the other country or the children would be deported. This decision was appealed to the U.S. Supreme Court which refused to hear the case. Ali also filed kidnapping charges against Linda in the other country, so she was officially a "kidnapper" with a $40,000 bond expected of her.

She did return and eventually the local court gave her custody after receiving a psychiatric evaluation of Ali, which said he was not fit to be a parent. Linda returned to the U.S. the next year and has remarried here with her children. Her children had weekly therapy. They are now close to their stepfather.

Interview 11 – Courtney and Stephen

Courtney married Stephen and had their son two years later. The abuse started within a few months of the marriage and escalated over time. Three months after their son's birth, the family went to northern Europe, but Courtney was under the assumption that they would be returning to the U.S. (they had purchased a round trip ticket). The family was struggling financially when they first were living abroad and Stephen continued to drink and be abusive toward her.

Soon thereafter, Courtney found a job as a nursing aid so that she could save some money for herself and her son. Four months later, the family returned to the U.S. and was living with Courtney's parents. One month later, Courtney returned to northern Europe with Stephen. She wanted to stay in the U.S. at the time, but she went back out of fear. Stephen was drinking heavily at the time and had blown out a light socket at her parents' house and elbowed their son on the forehead.

Six months later, Courtney contacted a local attorney and made a plan to return to the U.S. and go to her parents' house. Six months after leaving, she received full custody of her son (based on the abuse). Courtney and Stephen were divorced soon thereafter. Three months after the divorce, she was served with the Hague petition. Two years later, her divorce was finalized and she was granted full custody with no visitation for her ex-husband.

Interview 12 – Claudia and Raul

Claudia is of Latin American citizenship along with her husband, Raul, a man with an alcohol problem. Claudia had two children with Raul, a daughter who was six years old at the time of the Hague petition and a son who was two years old. Raul pushed her, threw things at her, hit her, and raped her.

Claudia filed for divorce in Latin America and separated from him. At one point, her young son tried to intervene to get Raul to stop hitting her. Claudia lived in another house with the children and Raul repeatedly broke into the house and broke her things after the divorce. Claudia went to the police, who told her to go to the Red Cross, who told her to come back in two days when the bruises were visible, only to turn her away two days later, saying they couldn't help her after the fact. Claudia had no one to defend her, and Raul was well-connected, both to powerful politicians and to drug dealers.

Claudia's sister lived in the U.S. (her mother was deceased and her father was remarried), so she came to U.S. She called the police in the U.S., who referred her to a local domestic violence program. The domestic violence program helped Claudia file a petition for asylum due to domestic violence and helped her get a restraining order.

Raul found her after four or five months and located the children in their schools. Eight months after she came to the U.S., Raul filed a Hague

petition and had the police remove the children from her custody. The Hague judge ruled against Claudia, saying it was a problem to be resolved in the Latin American country. But she already had the immigration case pending, so they allowed the children to stay with Claudia until the other court made its decision.

The Hague case was appealed, and Claudia won a month later. She had documentation from threatening messages Raul had written, letters from friends in the other country, documents from attorneys in the other country explaining the divorce, and the restraining order. After he lost the Hague case, Raul filed for another custody determination. He now has visitation rights, including weekend visits when he wants to exercise them (he still lives in the other country), and a yearly vacation with the children. Raul has taken the children back to the other country and returned them at the end of the vacation.

Interview 13 – Rita and David

Rita is of Latin American citizenship and lived with David in the other country. It is unclear if they were legally married. Rita had one child from a previous relationship and two children with David. It is unclear how violence developed in the relationship, but Rita reports that David was controlling, told her what to wear, whether she could have certain friends. David beat Rita and also beat her daughter (who was

not his child), but did not physically abuse his two children.

Rita had documentation consisting of a medical report about "lesions" David inflicted, which she presented to a local court in the other country, but they would not pursue the complaint. Rita also sought help from a government agency for family development, but David behaved more violently after the agency became involved, and the agency was ultimately not helpful. Twice Rita left David but returned to him.

Eventually Rita's parents left for the U.S. and encouraged her to leave with them. Rita spoke with local attorneys, who advised her that it was a lengthy process for him to get the children if she left with them. Rita had her children taken across the border by friends who passed them off as their children. Rita then moved to the U.S. to live with all three children (who were all 10 or younger) without David's approval.

David pursued and was granted custody of the children in the other country. A few months after arriving in the U.S., Rita was served with a Hague petition, and David's two children were taken from the Rita's home by six police officers. The petition required that Rita appear in court that day. She was given two continuances, but two weeks later, the judge ordered the children returned to the other country on the basis of the custody document. The

judge noted that domestic violence was not relevant to the determination.

The children returned, but Rita could not immediately return, because David had filed criminal kidnapping charges against her. Rita sought help in the U.S. and was able to find a lawyer in the other country who obtained temporary "immunity" for her. She negotiated to have the charges dropped.

For the first one and a half years Rita was in the other country, David did not allow her to see the children. The neighbors told Rita the children were alone, so she began to sneak to see them, but her children eventually told David they were meeting their mother. At that time, Rita and David made an agreement that she could see the children one day on the weekend. This is the current state of affairs.

Rita works, and earns enough to help her afford a small house and car. Her oldest daughter, now 14 years old is in the U.S. living with Rita's parents. Rita does not have enough money to go and see her, and is uncertain if she would be able to obtain a visa for the travel. They communicate via the internet. Rita's children in the other country are having psychological difficulties, including showing aggressive behaviors at school.

Interview 14 – Carmen and Rafael

Carmen is of Latin American citizenship. She had one daughter from a previous marriage, and had

two children with her second husband, Rafael. Rafael began abusing her within two weeks of their getting married. It started with him pushing her, pulling her hair and hitting her. It escalated to Rafael hitting Carmen and slamming her into the floor so that she lost consciousness.

Rafael threatened Carmen twice with weapons. The first time, he held an ice pick to her stomach while holding her jaw so tightly he dislocated it. Another time, he held a gun to her head and pulled the trigger. Carmen thought it was loaded and that he was going to kill her. After that, Carmen says she decided to obey everything Rafael said because she was afraid. Rafael hit all the children, sometimes with a belt and left marks. After they fled to the U.S., her oldest daughter reported that Rafael touched both girls sexually, although he did not rape them. He raped Carmen.

She sought help from family services in the other country, but they did nothing. Carmen went repeatedly to the police, but Rafael was a former police officer, and they also did nothing. After Carmen's youngest child was born, she asked for a divorce, in part because her oldest daughter had started standing up to Rafael when he hit her. Rafael refused to divorce Carmen.

The following year, Rafael moved out for a year but came back to the house frequently and was abusive. He found a therapist and asked Carmen to attend with him. The therapist told Carmen that she

needed to go back to Rafael. A year later, Rafael's behavior changed, became more erratic, guarded. He hit Carmen repeatedly with a doll in the face. She filed another police report, but the police would not pursue it. Rafael pushed her down the stairs while her son watched. He was three years old. Rafael's mother told Carmen to forget about the past and focus on being his wife.

It is unclear what finally motivated her to leave. Carmen had a brother in the U.S., so she came to be with him. Carmen and her oldest daughter had visas and came legally, but her two younger children were smuggled across the border by a *coyote*. She sought help at an immigrant women's program and was told to file for asylum. She began this process when Rafael found them and had the police remove the children from the house, pursuant to the Hague petition.

Carmen searched for an attorney that would help her keep the children in the U.S. and found one experienced in Hague cases who said it would be expensive. At the initial court hearing, Rafael was granted custody and she received two hours of visitation on Sundays and one 10-minute phone call per day.

They had the second hearing three weeks later where her attorney presented information about the domestic violence and Carmen's eldest daughter testified. Carmen was given custody of the children again. She officially won the case three years later. The children are in therapy. Carmen's second

daughter is having aggression problems and experiencing depression.

Interview 17 – Lindsey and Michael

Lindsey met her husband Michael in the U.S. They married a year later and then moved to Michael's native northern Europe. Once in the other country, Michael told Lindsey that he did not want to return to the U.S. Lindsey felt she had been "tricked" and "trapped," especially after she had her first son. She had two boys in the other country and then convinced her husband to move to Canada so she could be closer to her family. In Canada, Lindsey gave birth to her third son. She tried to return in the U.S. at this point, but eventually returned with Michael to the other country.

Once back in the other country, Michael ripped up her passport and the passport of one of her sons. Michael told Lindsey she would never leave again. According to local law, both parents have to agree to get a passport for a child. Michael did not allow Lindsey to have a bank account, credit card, or money. He monitored Lindsey's phone calls to her family. She had few local contacts because she did not speak the other country's language well.

Michael drank heavily periodically. During this time, Lindsey reports that she was careful not to provoke him, and when he was upset, he would push and shove her, or break things (i.e., glass door). Lindsey's sister flew to the other country to try and

talk him into letting her and the children leave. This was followed by increasing tension between the couple, with Michael remarking to Lindsey that he was considering ways to kill her. Lindsey felt very afraid of him at this point.

Michael made a suicide gesture, overdosing on pills and had to be taken to the hospital and have his stomach pumped. His psychiatrist told Lindsey that he thought she was the cause of Michael's problems. She had been told by others in the other country that a person could be detained in a psychiatric hospital if a spouse and a psychiatrist agreed they were mentally ill. Lindsey feared that her husband was trying to have her hospitalized and trying to win the support of the psychiatrist.

After that, Michael left the house with her 18-month-old daughter. Lindsey called the U.S. Embassy and was told by them that she should return to the U.S. They put her up in a hotel for three days and loaned the money for plane tickets for her and her three sons' home.

Six months after returning to the US, Lindsey received a Hague petition in the mail from Michael. She had no proof of the abusive situation she had lived through in the other country. She says that he was rarely physically abusive to her, and never hurt the children, just neglected them or did bizarre things like taking all of their schoolbooks and burning them in a bonfire. After losing her appeal, she was ordered to return the children to the other country. As she

promised to return the children, she was not escorted back to the other country. Lindsey found the only international attorney in her area of the U.S., and this was who she hired to represent her in the Hague petition.

Lindsey had another attorney in the other country who is appointed by the state. Her mother returned with her and they resided in the home with Michael. He went to court to try and have Lindsey's mother removed but lost. Lindsey began divorce proceedings a year later, and they were finalized two years after. She was given custody of her four children.

A year later, Lindsey and Michael got back together briefly. She felt that she had a new view of him after receiving a psychiatric report that said he was mentally ill – that he has a personality disorder characterized by obsession, sadistic perversion and paranoia. They had another son, but the relationship fell apart again.

The next year, the local court authorized Lindsey to return to the U.S. with the four older children and eventually added the youngest as well. Michael received visitation in the other country or the U.S. Michael has only sporadically exercised his visitation rights in the other country.

Lindsey notified Michael that she would be returning to the U.S. Michael appealed this and forced her to stay in the other country another year. Lindsey has received a family allowance in the other

country for the children, and money from her family, but has not worked while living there, in part because the other country restricts the ability of non-residents to work.

Interview 20 – Jennifer and Lawrence

Jennifer, a U.S. citizen, was living in northern Europe with her husband, Lawrence, who is a citizen of two European countries. While there, Jennifer has not been able to work because of her citizenship status and is not fluent in the language. Throughout the marriage of two years, Jennifer experienced physical and emotional abuse by Lawrence, including him hitting her while she was pregnant with their baby. On one occasion, she called the police to intervene in a violent incident. The police told Jennifer that she was crazy and they cautioned Lawrence to "guard the son's paper since he was married to an American woman."

A few months later, Jennifer and her son returned to the U.S. to her parents' house. Within a few weeks, she told her husband she planned to stay in the U.S. Soon thereafter Jennifer was served with a Hague petition. The U.S. judge was not familiar with the Hague Convention. He ordered the child to go back to the other country. Jennifer was also asked to return with the child because the judge was not confident that Lawrence could care adequately for the child. Jennifer and her son are currently living in the other country on a tourist visa, which means she

cannot work to support them. They are awaiting a judgment from the local courts about custody and visitation arrangements and child support payments.

Interview 21 – Amy and Raymond

Amy met her husband, Raymond, a northern European, married him, and over the next three years two sons were born. Amy had difficulties in her marriage, but would not discuss them, other than to say her second son was conceived as a result of rape. Her youngest was two years old when Raymond, the owner of a large multi-million dollar company, relocated the family to a rural area in the other country.

Raymond began to act strangely, and Amy began to find pornography at the house. Raymond hired an au pair who left after two weeks for reasons that Amy does not know. During this time, Amy's bank card was cut off, and when she tried to reach Raymond by phone, she was not able to contact him. Amy heard from other people that Raymond was saying they had separated, and she discovered later that he had filed for divorce without telling her.

After finding out about his desire to separate, Amy went to court and filed a restraining order, but when she called the police to enforce it, they would not respond. Amy said "we became prisoners," because they were isolated in the country, with no money and no help from the police. Amy found pictures taken by Raymond of the children naked

with their genitals exposed. She talked to the U.S. consulate staff who advised her that she could go home to the U.S. for a visit with the children.

Amy took her sons to the U.S., and tried to get an operation for her younger son who had a severe medical problem. Raymond filed a Hague petition a few months later. Amy received referrals for three attorneys, but she was dissatisfied with her attorneys. One month later, the judge ordered the children returned to the other country. Amy represented herself on the appeal and lost. Her children were returned to Raymond a month later, and she has not seen them since.

Amy flew back to the other country at the same time as her children and tried to get the local judge to enforce the undertakings that the U.S. judge required – namely, that criminal kidnapping charges against her be dropped, that the children receive counseling, that the father allow visitation, and that her son receive the operation for his medical problem. As far as Amy knows, none of these undertakings have been enforced in the other country.

So Amy returned to the U.S. eight months later. She stayed briefly with her parents and then has been living in various shelters in the U.S. since, she says because Raymond is continuing to harass her by tapping her parents' phone and having her followed when she lived in an apartment. She found a new attorney through an international battered women's

organization and she is continuing to pursue her legal case in the other country.

Interview 22 – Carolyn and Christopher

Carolyn is a U.S. Citizen. She married Christopher and then moved with him to northern Europe. Very soon after their marriage, Christopher began to verbally abuse her. A year after their daughter was born, things came to a head and Christopher threatened to kill and kicked Carolyn. Immediately following this incident, Carolyn went to a women's shelter for a few days and started divorce proceedings.

Two years later, Carolyn and her daughter returned to the U.S. After being in the U.S. for almost a year, Carolyn was served with a Hague petition and had to appear in court one week later. In the Hague process, the judge decided that the daughter should go back to the other country with Christopher. Carolyn has been involved in a lengthy custody dispute in the other country since that time.

APPENDIX B

Survey of Published American Hague/Domestic Violence Cases

Lower courts ordering return:

- *Foster v. Foster*, No. C.A. 09-093, 2009 WL 2883036 (W.D. Pa. Sept. 4, 2009), *stay denied*, 2009 WL 3064738 (W.D. Pa. Sept. 18, 2009).
- *Jaet v. Siso*, No. 08-81232-CIV, 2009 WL 35270 (S.D. Fla. Jan. 5, 2009).
- *Kufner v. Kufner*, 480 F.Supp.2d 491 (D.R.I. 2007).
- *Lieberman v. Tabachnik*, 625 F.Supp.2d 1109 (D. Colo. 2008).
- *Lopez v. Alcala*, 547 F.Supp.2d 1255 (M.D. Fla. 2008).
- *Simcox v. Simcox*, 499 F.Supp.2d 946 (N.D. Ohio 2007).
- *In re B. del C.S.B.*, 525 F.Supp.2d 1182 (C.D. Cal. 2007) (acquiescence and child's wishes defenses).
- *Adan v. Avans*, C.A. No. 04-5155 (WHW), 2007 WL 1850910 (D.N.J. June 25, 2007).
- *Mendez Lynch v. Mendez Lynch*, 220 F.Supp.2d 1347 (M.D. Fla. 2002).
- *Danaipour v. McLarey*, 183 F.Supp.2d 311 (D. Mass. 2002).
- *Gil v. Rodriguez*, 184 F.Supp.2d 1221 (M.D. Fla. 2002).
- *In re Walsh*, 31 F.Supp.2d 200 (D. Mass. 1998).

- *Krefter v. Wills*, 623 F.Supp.2d 125 (D. Mass. 2009) (not specifically mentioning abuse, but said that Petitioner desires being "in control at all times" and had "several angry outbursts" during his testimony).
- *Garcia v. Angarita*, 440 F.Supp.2d 1364 (S.D. Fla. 2006) (respondent can ameliorate the risk that exists in returning child to Colombia if she "[discontinues] the activities which . . . have resulted in a degree of parental alienation toward Petitioner, and if Respondent returns with the children").
- *In re D.D. (Dallemagne v. Dallemagne)*, 440 F.Supp.2d 1283 (M.D. Fla. 2006).
- *Giampaolo v. Erneta*, 390 F.Supp.2d 1269 (N.D. Ga. 2004).
- *Belay v. Getachew*, 272 F.Supp.2d 553 (D. Md. 2003).
- *Croll v. Croll*, 66 F.Supp.2d 554 (S.D.N.Y. 1999).
- *Antunez-Fernandes v. Connors-Fernandes*, 259 F.Supp.2d 800 (N.D. Iowa 2003).
- *Mendez-Lynch v. Pizzutello*, No. 2:08-CV-0008-RWS, 2008 WL 416934 (N.D. Ga. Feb. 13, 2008).

Appellate courts upholding return:

- *Kufner v. Kufner*, 519 F.3d 33 (1st Cir. 2008).
- *Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000) (affirming lower court, lower court opinion not available).

- *Dalmasso v. Dalmasso*, 9 P.3d 551 (Kan. 2000) (affirming lower court, lower court opinion not available).
- *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999) (affirming lower court, lower court opinion not available).

Appellate courts reversing or remanding lower courts' order of return:

- *Simcox v. Simcox*, 511 F.3d 594 (6th Cir. 2007) (grave risk exists).
- *In re B. del C.S.B.*, 559 F.3d 999 (9th Cir. 2009) (child was "well settled" and father was not entitled to equitable tolling).
- *In re Adan*, 437 F.3d 381 (3d Cir. 2006) (remanding because District Court erred in determining that father satisfied his burden of proof as to custody rights under Argentine law; and abused its discretion in the manner it determined that returning the child to Argentina would not constitute grave risk) (lower court opinion not available).
- *In re Adan*, 544 F.3d 542 (3d Cir. 2008).
- *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002) (remanding with directions to dismiss Hague petition because 1) a *ne exeat* clause does not confer custody rights; and 2) *patria potestas* does not confer custody rights) (lower court opinion not available).
- *Van de Sande v. Van de Sande*, 431 F.3d 567 (7th Cir. 2005) (remanding because mother established prima facie claim of "grave risk

of harm" to children) (lower court opinion not available).

- *Danaipour v. McLarey*:
  - 286 F.3d 1 (1st Cir. 2002) (reversed and remanded because 1) District Court had erred by ruling that children be returned to Sweden without first determining if the children had been sexually abused; 2) court also erred in ruling that a forensic sexual abuse evaluation could be properly done in Sweden; and 3) undertakings issued by the District Court were invalid).
  - 386 F.3d 289 (1st Cir. 2004) (admitting and considering statements of daughter that were repeated to doctor by mother and others was not an abuse of discretion; evidence supported finding sexual abuse of youngest daughter; district court did not have to further inquire into remedies available through Swedish courts upon finding that psychological harm would be the consequence of returning daughter).
- *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000) (grave risk of harm existed, and father's undertakings and potential for entry of Irish court orders did not mitigate the grave risk of harm).
- *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000) (*ne exeat* does not confer custody rights).

Lower courts refusing return:

- *Baran v. Beaty*, 479 F.Supp.2d 1257 (S.D. Ala. 2007) (grave risk).
- *Baxter v. Baxter*, 324 F.Supp.2d 536 (D. Del. 2004) (father consented to removal, in the alternative, grave risk would exist).
- *Elyashiv v. Elyashiv*, 353 F.Supp.2d 394 (E.D.N.Y. 2005) (grave risk).
- *Blondin v. Dubois*:
  - 19 F.Supp.2d 123 (S.D.N.Y. 1998) (grave risk).
  - 78 F.Supp.2d 283 (S.D.N.Y. 2000) (grave risk).
- *Laguna v. Avila*, No. 07-CV-5136 (ENV), 2008 WL 1986253 (E.D.N.Y. May 7, 2008) (child of sufficient age and maturity did not want to return).
- *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045 (E.D. Wash. 2001) (grave risk).

Appellate courts upholding refusal of return:

- *Baran v. Beaty*, 526 F.3d 1340 (11th Cir. 2008).
- *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001).

Appellate courts reversing or remanding refusal of return:

- *Baxter v. Baxter*, 423 F.3d 363 (3d Cir. 2005) (father did not consent and return would not place the child in grave risk).

- *Blondin v. Dubois*, 189 F.3d 240 (2d Cir. 1999) (remanded because evidence supports 'grave risk' determination but remand is necessary to consider range of remedies that might allow return of children to their home country and protect them from harm).
- *In re A.V.P.G.*, 251 S.W.3d 117 (Tex. App. 2008) (reversing and remanding county court's denial of return petition because, *inter alia*, mother did not establish that children were in grave risk if returned).
- *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995) (reversing and remanding because 1) finding grave risk if child were returned not supported by sufficient evidence; and 2) ruling could not be supported on basis that Mexico was not habitual residence (lower court opinion not available).

APPENDIX C

Interest of the *Amici Curiae*

The following organizations respectfully submit this brief as *Amici Curiae* in support of the Respondent and urge the Court to affirm the decision below.

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** was founded in 2003 by one of the nation's leading domestic violence lawyers and scholars. DV LEAP provides a stronger voice for justice by fighting to overturn unjust trial court outcomes, advancing legal protections for victims and their children through expert appellate advocacy, training lawyers, psychologists and judges on best practices, and spearheading domestic violence litigation in the Supreme Court. DV LEAP is committed to ensuring that the Supreme Court understands the realities of domestic violence and the law when deciding cases with significant implications for domestic violence litigants. DV LEAP has previously co-authored amicus briefs to the United States Supreme Court in *Town of Castle Rock, Colo. v. Gonzalez; Davis v. Washington; Hammon v. Indiana; Giles v. California; and United States v. Hayes.* DV LEAP is a partnership of George Washington University Law School and a network of participating law firms.

The **Battered Women's Justice Project – Domestic Abuse Intervention Programs, Inc., Duluth, MN ("BWJP")** is a national technical assistance center that provides training and

resources for advocates, battered women, legal system personnel, policymakers, and others engaged in the justice system response to domestic violence. The BWJP promotes systemic change within community organizations and governmental agencies engaged in the civil and criminal legal response to domestic violence, in order to hold these institutions accountable for the safety and security of battered women and their children. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice. In an effort to promote more safe and just results for women and their children, the BWJP works at state, national and international levels to engage court systems in methods of accurately assessing the effects of intimate partner violence on women and children and to fashion safe outcomes that hold batterers accountable. The BWJP respectfully requests the U.S. Supreme Court to support the position of Ms. Abbott, and the ultimate safety and best interests of children throughout the world, by ruling that *ne exeat* clauses alone are not equated with rights of custody under the Hague Convention on the Civil Aspects of Child Abduction.

The **National Coalition Against Domestic Violence** is a nonprofit organization dedicated to providing advocacy leadership, representation, and

support to battered women and their children throughout the United States. NCADV's work includes coalition building at the local, state, regional, and national levels; support for the provision of community-based services such as safe houses and shelter programs; public education and technical assistance; policy development and innovative legislation; and efforts to eradicate the social conditions that contribute to domestic violence. NCADV's membership is comprised of over one thousand grassroots organizations, community programs, and individuals dealing with the concerns of battered women and their families. NCADV is very concerned about the re-victimization of abused women and children who are returned to their batterers pursuant to proceedings under the Hague Convention on the Civil Aspects of Child Abduction.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum is dedicated to working to end violence against women and was one of the lead advocates for the landmark Violence Against Women Act and its reauthorizations, which seek to redress the historical inadequacy of the justice system's response to domestic violence. Legal Momentum also represents victims of domestic violence who suffer housing and employment discrimination related to the violence. Legal Momentum is concerned that the Court's ruling in this case could have a devastating impact in the significant number of Hague Convention cases in which only by fleeing

can mothers protect their children from the harm of an abusive father's direct violence against them, of witnessing violence against the mother, or of living in a home suffused with the tension and fear domestic violence generates. Legal Momentum has participated in numerous briefs and *amicus curiae* briefs to the Supreme Court including as co-counsel on recent *amicus curiae* briefs concerning domestic violence: *Davis v. Washington; Hammon v. Indiana*; and *People v. Giles*.

The National Network to End Domestic Violence (NNEDV) is a non-profit membership organization devoted to remedying domestic violence through legal, legislative, and policy initiatives. The members of NNEDV are the state coalitions against domestic violence, who represent their states' local organizations that provide shelter, advocacy, and legal and counseling services to survivors of domestic violence. The member organizations of NNEDV collectively represent thousands of organizations that have hundreds of years of experience working with survivors of domestic violence, including undertaking extensive efforts to improve the justice system's response to victims of domestic violence. NNEDV is concerned that the Court's ruling in this case could make it more difficult to protect victims of abuse.

AMICUS CURIAE BRIEF

NOV 24 2009

No. 08-645

In the Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,
Petitioner,

v.

JACQUELYN VAYE ABBOTT,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Does a travel restriction that prohibits a custodial parent from moving a child abroad without judicial consent confer custody rights on a noncustodial parent who otherwise has only visitation rights so that, if the travel restriction is violated, the noncustodial parent can demand the child's return under the 1980 Hague Child Abduction Convention? Is the answer different if the restriction permits consent by either the court or a visiting parent?

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INTEREST OF THE AMICI

We write as academics with no financial interest in the outcome of this case.[1] We teach in the fields of conflict of laws, family law, comparative law, and international law. Our sole concern is for the correct interpretation of the Convention.

SUMMARY OF ARGUMENT

The 1980 Convention on the Civil Aspects of International Child Abduction[2] (the Convention) is the first international family law treaty this country joined. It applies to wrongful international removals or retentions of children between Contracting States.

When a noncustodial parent removes a child from the custodial parent,[3] absent narrow defenses, the

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1 Pursuant to Supreme Court Rule 37.6 counsel for the *amici* certify that no counsel for a party authored any part of this brief, and no person or entity other than counsel for the *amici* has made a monetary contribution to the preparation or submission of this brief. The parties' consents have been filed.

2 T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (references to "Article" is to this Convention, unless otherwise stated). The Hague Conference published the Convention's legislative history in III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION (hereafter ACTES).

3 For ease of comprehension, we will use terminology common in this country's family law. The parties will be called Mother and Father, and "visitation" is used in place of "access". Parents who hold any form of joint custody will be identified specifically. What have come to be known as *ne exeat* orders or provisions will be called travel restrictions unless specificity requires otherwise.

Convention returns the child to the caregiver.[4] There is no dispute (apart from the limited question of travel restrictions) that when it is a custodial parent who removes the child from a noncustodial parent, the Convention does not provide for return, but rather such remedies as are available in the new location.[5]

This dramatic distinction in the remedies for custodial and noncustodial parents requires that custody and visitation be clearly delineated, as a blurring of the distinction would have unintended and potentially grave consequences. The Convention therefore separately defines "rights of custody" and

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[4] Because only a removal is involved in this case, in this discussion we will omit references to wrongful retentions, which concern refusals to return a child after visits abroad. Every time we refer to a removal, however, the Convention treats retention in the same fashion. We shall also limit discussion to matters that involve two countries that have reciprocal treaty obligations. We note, however, that the Convention permits ratification only by countries or their successors who were members at the time of promulgation; all others must accede, and as to these countries, the treaty is in force only for other States Parties that accept the accession. For the explanation for these rules, *see* Carol S. Bruch, *Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases Under the Hague Child Abduction Convention*, 33 NYU J. Int'l L. & Politics 49, 49-51 (2000).

[5] *See* Art. 21 (providing Central Authority assistance "to promote the peaceful enjoyment of access" and "remove obstacles" to it; permitting assistance in filing proceedings). *See also* Art. 7; Carol S. Bruch, *The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed*, 28 FAM. L.Q. 35 (1994).

"rights of access" as distinct and non-overlapping categories.

The normal meaning of the treaty language, as well as its context and purpose, makes clear that a visiting parent remains a visiting parent even when travel restrictions from any source (also known as *ne exeat* provisions) are breached by the child's removal. The clear negotiating history, including a 19-3 vote that expressly rejected a proposal to provide returns for visitation cases, including those that contain travel restrictions, confirm this conclusion: travel restrictions protect visitation rights and do not import custody rights into a visitation order. The Convention was not intended to, and does not, provide a "right of return" remedy for a parent who takes a child away from a parent with sole custody, for breach of a travel restriction.

Contrary to assertions in some of the briefs, the weight of persuasive foreign law does not support interpreting travel restrictions as conferring custody rights under the Convention. Several of the cited decisions about violations of travel restrictions merely hold that a visiting parent with joint custody has a right to return, a rule set forth in the express language of Article 3, and therefore are not relevant. The remaining decisions come primarily from countries that apply common law methodology to Convention litigation and often defer to decisions of the English courts, but the Canadian Supreme Court disagrees, as does the majority of U.S. lower court

opinion – two countries which, taken together, have a roughly equal Convention caseload.[6]

There is thus at present no "weight of common law authority" that favors granting custody rights when travel restrictions are present in what is otherwise a straightforward visitation case. Rather, there is a genuine disagreement among the common law courts that have addressed the question. Once corrected for misinformation and lacunae in the foreign law materials that have been cited to this and other courts, moreover, the civil law authorities on point are similarly divided. Taken as a whole, the foreign caselaw fails to provide a consistent view that deserves this Court's deference. What is essentially bean-counting, however denominated, and whether invoked by those supporting Petitioner or those, like ourselves, who support Respondent, surely should not dictate this country's international commitments.

What is at issue in this case, we submit, is an effort to amend the 1980 Convention under the guise of interpretation. As is evident from the State Department's own change of position,[7] the view that

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[6] *See* Appendix A.

[7] The State Department's own legal analysis accompanying submission of the Convention to the Senate takes it as "given" that the Convention is aimed at protecting those who actually care for the child against those who use abduction as a means of modifying custody arrangements. *See* 51 Fed. Reg. 10494, 10504 (a fundamental purpose is to prevent child abductions by persons as a means of "obtaining their physical and/or legal custody"); 51 Fed. Reg. 10505 ("it is up to the person who actually exercised custody prior to the abduction . . . to invoke the Convention to secure the child's return"); 51 Fed. Reg. 10507

travel restrictions confer "custody rights" is of relatively modern origin, and was not the view when the Convention was drafted. The question of protecting visitation rights is particularly complex and nuanced. The "interpretation" urged upon the Court would address only one small aspect – travel restrictions – by itself, and without consideration of the whole subject matter. This isolated alteration is not only juridically impermissible, but also unwise as a practical matter. Travel restrictions are, for example, increasingly used to protect convenient visitation, and several of the cases where they were treated as conferring custody rights reveal sobering facts that call them into question as persuasive authority. Amendment should be therefore be sought through legislative means: a new document promulgated by a plenary diplomatic session of the Hague Conference on Private International Law. That avenue is available, as consideration of such a protocol was placed on that body's work schedule earlier this year.[8]

Only if a revision is considered in the appropriate diplomatic venue, will it be possible for the United States, in concert with other nations, to review experience under the 1980 Convention (including cases ordering return that have resulted in great harm), to consider the needs of women and children in abuse cases – a topic not addressed when the 1980 Convention was drafted, and to make a full

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("in the scheme of the Convention it is presumed that the person who has custody actually exercised it").

[8] *See* http://www.hcch.net/upload/wop/genaff_concl09e.pdf

examination of the best scientific information now available on the needs of children when their parents live apart and dispute custody. Such inquiries are impossible in the expedited, truncated consideration of an individual parent's return petition in a case such as this one.

In conclusion, the clear language of the Convention, when read in good faith and taken in context, given the structure and purposes of the treaty, as well as the negotiating history, dictates the correct result: a holding that the presence of a travel restriction does not confer rights of custody on a party who otherwise holds only visitation rights. Because of deficiencies in the record that we identify throughout this brief, we also conclude that dismissal of certiorari as improvidently granted would be an appropriate alternative disposition.

ARGUMENT

I. The Nature and Effect of the Travel Restrictions in this Case are Debatable and Uncertain.

Under Article 3 of the Convention, the removal of a child is considered wrongful if it is in breach of custody rights under the law of the place "in which the child was habitually resident immediately before the removal or retention."[9] In this case, the reference

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[9] The Convention's official Explanatory Report states that this reference implicitly includes "the rules of private international law", i.e., choice-of-law rules, so that all possible sources of law are available.

is to Chile, where the family had lived for three years when the mother took the child to Texas.[10]

Father claims that two Chilean travel restrictions confer custody rights on him and, therefore, entitle him to the child's return:

a. A court's "stay-put" order that was entered in Chile to thwart Father's possible abduction of the child from Mother that also prevented anyone else from removing him, and that Father claims now authorizes him to remove the child from Mother, who has held sole custody throughout, and
b. The Chilean Minors Law, which, if it applies, requires content to the child's removal by its custodial parent from Chile from either a court or a parent who has court-ordered visitation.

It is at best uncertain whether either of the travel restrictions, one a court order and the other a statutory provision, confers any rights on the father, much less rights of custody.

The Chilean court's order was entered to restrain Father, not to confer rights on him. On January 13, 2004, Mother told the court that she sought the order because her husband, whose visits with their son were supervised, had obtained a British passport for their son, had not returned him as required some days before, and planned to leave the country soon –

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[10] The family members were expatriates: the father was a U.K. national, the mother a U.S. citizen, and the child held both citizenships.

she feared he would take the child with him. Mother had been advised that an "orden de arraigo" would ensure that the country's international police could take action. This writ, a stay-put order, restrains a person (here, the child) from leaving Chile and can only be lifted by a subsequent court order.[11]

Because Mother sought the order to protect her own sole custody, she may not have realized that it also bound her when, some 19 months later, she brought her son to Texas. Whether she did or not, however, is irrelevant for purposes of interpreting the Convention.[12]

The applicability of the Chilean Minors Law 16,618 art. 49 is apparently even more uncertain.[13] Because it does not authorize Father to affirmatively decide where the child will live, either within Chile or

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[11] Email from Cristián Fabres, Guerrero, Olivos, Novoa y Errázuriz, to Professor Bruch (Nov. 2, 2009 at 6:39 a.m.) (noting conflicting statutory and choice-of-law rules). Mr. Fabres is a Chilean lawyer who holds an LL.M. from the University of California, Davis. We realize that Mother may have acquiesced in the application of the Minor's Law, rendering the point moot in this case. We nevertheless bring to the Court's attention that, because travel restrictions are more varied than custody and visitation laws, holding them to confer custody rights and thereby importing choice-of-law analysis as to their possible application, could considerably complicate and protract return proceedings.

[12] *See infra* n.23.

[13] The materials provided by Petitioner predate a 2001 amendment. The change, however, appears not to concern this case. Fabres, *supra* n.11, at 11:22 a.m. *See* Appendix B for the current language.

abroad, it does not satisfy the Article 5*a* definition of custody rights in any event.

Also uncertain is the view of the Chilean authorities on the applicability of either travel restrictions; they apparently allowed the mother and child to depart without difficulty, although both passports must have included visas reflecting their local residence. These would have alerted them to ask for the father's consent, had they understood the Minors Law to apply to foreign residents, and to determine whether the stay-put order had expired or, if not, bound Mother.

Whatever the answers to these factual questions and however opaque the legal analysis in this specific case, we are here concerned with the broader, and more fundamental question of treaty interpretation: whether the Convention provides a right of return for a parent who has neither sole nor joint custody, but only visitation rights and a *ne exeat* order.

II. The Convention Does Not Provide a "Right of Return" for Violation of Travel Restrictions if the Applicant Holds Only Visitation Rights.

A. Article 5 of the Convention Establishes a Clear Distinction between Rights of Access and Rights of Custody.

The Convention should be interpreted in "good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and

in light of its object and purpose."[14] The analysis begins with the definition of "custody rights" under Article 5(a) of the Convention.

While the determination of residence figures prominently in Article 5(a), the concept of "rights of custody" is much broader. It is, moreover, a unified concept, pertaining to care of the child, and not a bundle of separate rights that are severable and unrelated.

This is first of all clear from the structure of the subparagraph. The conjunction in part *a* is "and", not "or" ("*and* in particular, the right to determine the child's place of residence"). Thus, the determination of residence is only part of the overall concept of custody, and not a separate and independent feature or right of custody for purposes of the Convention.

This understanding is reinforced by the words "in particular," which make sense only if what follows them is an example of the controlling concept, that custody consists of "rights *relating to the care of the person* of the child") (emphases added). Father's claim would require that the words "in particular" be rendered nugatory.

This reading is also consistent with the family law context in which the Convention was drafted. Notwithstanding the variations of differing legal systems, there were still, generally speaking, three basic types of "custody" under discussion, as a reading of the *procès verbaux* clearly demonstrates:

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[14] 1969 Vienna Convention on the Law of Treaties art. 31.

sole custody, joint custody, and (in some situations) physical custody without strict legal custody (e.g., grandparents).

The contrary interpretation urged by Father depends on a strained and highly artificial view of custody – not as an ordinary and common-sense concept, but rather as a mere bundling of separate, individual rights that can be severed asunder and conferred in varying directions and assortments, somewhat akin to financial "derivatives". It also depends on a strained reading of the concept of determining residence. The veto right of a visiting parent that is conferred by a travel restriction imposes no custodial responsibility for the child's personal care and is unrelated to making a home for the child; it merely limits, absent court approval, the possibilities of living in a foreign country.

As his sole custodian, the mother provided the child's daily care in Chile, was responsible for his welfare, and made a home for him. The father had in fact no power to determine where the child would live,[15] and his asserted power to veto the child's relocation outside Chile is unrelated to the child's personal care that is the essence of custody.

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[15] In the instant case, the order can be lifted only by the Court; by its terms, it does not confer rights on Father, either to authorize or veto the child's relocation. The Chilean statute, in contrast, requires that either the visiting parent or a court consent to the child's departure. Fabres, *supra* n.11. If it applies, Father's potential veto is subject to the power of a court to say otherwise.

Thus, under the normal and ordinary meaning of Article 5, custody is a unitary concept, pertaining to the care of a child for whom one is fundamentally responsible. A travel restriction (*ne exeat* provision) in this context does not amount to a right of custody. It neither grants any responsibility for personal care, nor does it grant the authority to determine the child's caretaker and residence.

B. The Structure and Purpose of the Convention Envisions a Right of Return Only for a Person with Sole, Joint or (in Exceptional Cases) De Facto Custody.

The structure and purpose of the Convention also support the view that there is no right of return for a noncustodial parent.

The Convention has a limited, precise and specific focus: to prevent the removal of a child from a sole or joint (or sometimes de facto) custodian. The only remedy provided in the Convention is return of the child and in the case of a noncustodial parent, this is a manifestly inappropriate remedy. A return to the country of the child's habitual residence, based on the violation of a travel restriction, effectively transfers the child's custody to the visiting parent, either for the duration of pending litigation or permanently.[16]

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[16] Because the law generally prefers stability in custodial arrangements, even a "temporary" custody award to the visiting parent dramatically increases the likelihood that the noncustodial parent will obtain a permanent custody award once the case is decided, simply because by then the child will have

It thus turns the Convention on its head, removing the child from the parent with whom he or she is supposed to live and effectively changing the terms of custody.

As is implicit in the word "return," the point of the return remedy is to restore the *custodial status quo ante.*[17] The focus on preserving custody, pending a contrary court determination on the merits, is reflected in the overall structure of the Convention. Apart from the question of travel restrictions, there is no dispute that children who were removed by their custodial parents in breach of the other parent's access rights will not be returned; they will remain with the caregivers while any visitation or custody issues are addressed, until the court which is responsible for custody arrangements reaches a different determination. Similarly, even if the "left-behind parent" holds a theoretical right to custody, if

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lived in that person's household for an extended period. *See infra* n.52.

[17] Those who argue that the Convention prescribes a jurisdictional status quo ante have confused this country's uniform state law for custody jurisdiction, the Uniform Child Custody Jurisdiction and Enforcement Act. This is the successor Act to the Uniform Child Custody Jurisdiction Act for which Professor Bodenheimer was the Reporter. She had already identified serious problems when the former home state entered punitive decrees – custody transfers that ignored the child's best interests in order to punish the custodial parent. In this case, although the court in Chile affirmed its continuing jurisdiction, we are not told whether Father sought custody.

he or she has not actually been exercising custody, the child will remain with the de facto custodian.[18]

The court that orders the return is not supposed to be deciding or changing custody rights; the return order is not supposed to change the de jure or de facto responsibilities for the child's custody. As Perez-Vera notes in her report, the drafters of the Convention believed that the "right of return" *to a custodial parent* was consistent with the child's best interests, because the child needs, whenever possible, a certain stability of home life and caregiver. The Convention, the Explanatory Report states, aims to remedy a child's "traumatic loss of contact with the parent who has been in charge of his upbringing."[19]

Even where there is manifestly an abduction by a noncustodial parent, in violation of custody rights, therefore, and even if the child has been concealed, if the application is not filed within one year and the child has, in the meantime, become settled in its new environment, return may not be ordered.[20] In each of these situations, the child remains with the established caregiver, notwithstanding the removal, and custody litigation – if any – will take place where the child now lives. There may be (and often are)

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[18] Art. 13*a*.

[19] One objection to authorizing return orders for breaches of access rights was in fact the fear that this would result in transfers of custody to visiting parents. ACTES 432 ¶25, 444-45 ¶¶ 65-66.

[20] Art. 12.

other issues that need to be addressed, but the Convention itself does not address them.[21]

In light of some of the arguments made in this case, it seems important to stress that the Convention is different from the United States domestic law, as reflected in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[22]. The UCCJEA, in contrast to the Convention, restores the *jurisdictional* (as opposed to custodial) status quo ante in all but exceptional circumstances. The Convention's drafters knew of the original version of this uniform state law and of problems its Reporter, the late Professor Brigitte Bodenheimer, had already identified in its operation.[23] On behalf of this country, she and the other family law expert on the US delegation, Lawrence Stotter, Esq., played an influential role in shaping different, more finely tuned, rules for the Convention.[24] The "unclean hands" of a removing

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[21] As discussed in section IV below, the drafters' solicitude for the child's relationship with its primary caretaker and their caution about a simplistic one-size-fits-all response to breaches of visitation rights was wise when the Convention was drafted, and 30 years later an increasing body of scientific knowledge that reports the needs of children whose parents do not live together confirms their insight. *See infra* n.52.

[22] 9 U.L.A. 649 (updated to 2009).

[23] Brigitte M. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CAL. L. REV. 978 (1977) (discussing the UCCJA, 9 U.L.A. 261 (updated to 2009)).

[24] *See* Adair Dyer, *To Celebrate a Score of Years*, 33 NYU J. INT'L L. & POL. 1, 10-11 (2000).

parent, although relevant in state UCCJEA proceedings, are completely irrelevant, *and deliberately so*, in Convention proceedings.[25]

It could be argued that, in lieu of returning the child to a noncustodial parent, the child could be "returned" to some institution, pending a new custody determination. This is even less desirable in terms of the purpose and intent of the Convention. It is again not a true "return," as the institution never had custody initially. Relegating a child to institutional care, moreover, can hardly be considered "in the best interests of the child," as compared to the care of a competent parent. Far from maintaining the stability of the child's parental, educational, and social relationships, placing a child in an institution is wholly novel and disruptive. To consign a child to a wholly unfamiliar situation for an indefinite time, lacking any normal home life and deprived of both parents, in order to vindicate some presumed fractional custody right, is completely inconsistent with the welfare of the child and the purpose of the Convention.[26] Moreover, the concept of care "pending a new custody determination" is also inconsistent with the concept underlying the Convention – to preserve the custody of the primary custodial parent, pending a contrary determination on the merits.

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[25]A change in custody to punish a custodial parent wholly ignores the guiding principle of best interests of the child and is anathema to the Convention. Professor Bodenheimer termed such orders punitive orders, because their aim is to punish the abductor while ignoring the child's interests, and was on record as criticizing the approach taken by the UCCJEA.

[26] ACTES, 431-32 ¶24.

In conclusion, interpreting the Convention to provide a right of return that takes a child away from a sole caregiver is contrary to the structure and purpose of the Convention. It turns the Convention on its head, making it a vehicle for reversing custody arrangements, and places children in harm's way rather than protecting them.

C. The Preparatory Works Support this Interpretation.

If ambiguity exists in treaty language, Article 32 of the Vienna Convention permits recourse to the preparatory works of the Convention. Although we do not consider this step necessary, as the language and context are clear, the legislative materials confirm the analysis we have already set forth.

The record of Convention negotiations establishes that the Convention was not intended to provide a right of return for violation of travel restrictions,[27] and an amicus brief for two distinguished delegates to the Special Commissions that wrote the Convention, one of whom served on the Drafting Committee, confirms this understanding.[28]

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[27] ACTES, *passim*.

[28] Their brief is consistent with Professor Bruch's published summary of her contemporaneous discussion with the late Professor Brigitte M. Bodenheimer, the lead spokesperson for the U.S. delegation until too ill to participate. *See* Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529. 539 n.33 (2004) (abridged at GPSolo 14 (Sept. 2005)) (Best Articles Published by the ABA).

When the Convention was drafted there was relatively little experience with such travel restrictions. A background study for the drafters reported a dearth of knowledge on the topic at the international level, but mentioned that restrictions on relocation were used by US courts "from time to time," particularly to prevent moves by custodial parents back to their families of origin in sister states or foreign countries. After listing a range of theories and potential problems in visitation cases (but never mentioning abuse), the report concludes, "The best answer to this dilemma [of facilitating abduction opportunities by granting visitation, but, conversely, also prompting abductions if visitation is denied or is too severely curtailed] may well consist of a mechanism for cooperation among legal authorities . . . ," the very solution later included in the Convention.[29]

Travel restrictions were discussed only briefly, when the delegates considered and defeated 19-3 a Canadian proposal that would have given breaches of visitation (including breaches of travel restrictions) the same remedy as breaches of custody – return orders.[30] This discussion makes clear that, with the possible exception of the delegate from the

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[29] *See* ACTES, 50-51 (discussing the possible functions of Central Authorities, none of which includes treaty interpretation). The functions of Central Authorities, which are consistent with that preparatory report, are set forth in Articles 6-10.

[30] *See* ACTES, 262 (Working Document No 5 – Proposal of the Canadian Delegation (to add "or access" after "breach of rights of custody" in Art. 3)).

Netherlands, the drafters -- including even the Canadian delegate -- regarded violations of travel restrictions as pertaining to rights of access, not rights of custody.[31]

One delegate noted that to permit a return remedy for a visiting parent would run counter to the Convention's purpose, which is to protect custodial parents.[32] Others noted that this approach would make it possible for a visiting parent to become a custodial parent and would therefore contravene the Convention's purpose – the very issue in this case.[33] When the vote was taken, 19 (including the United States) voted against the Canadian proposal, and 3 voted in favor (Canada, Ireland and Israel).

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[31] *See* ACTES, 266. H.A. Leal of Canada, who was also Chairman of the Drafting Committee, said that at times rights of access could have "almost the same importance as rights of custody," and gave the following example: "Custody is given to the mother, but the order provides that the child cannot go out of the jurisdiction without the father's consent. If the mother nevertheless leaves the jurisdiction without such consent, that [would constitute] wrongful removal [under his proposal]." Jenard (Belgium) said the convention would not help a visiting father if a mother moved away.

[32] *See* ACTES, 266 (Holub (Czechoslovakia)). An observer for the Commonwealth (Eekelaar), who – as is the rule for observers – was permitted to speak but had no vote, mentioned joint custody cases, which are specifically recognized as custody rights by the Convention, and said possibly Leal's hypothetical might be included in Article 5. This ambiguous comment by a nonparticipant cannot be given significance.

[33] *See* ACTES, 266-27 (Chatin (France); Jenard (Belgium) (second intervention)).

There was no further discussion of providing a right of return for violation of travel restrictions; the topic was thereafter completely abandoned.

D. Post-Promulgation Discussions at the Special Commissions, Many Years Later, Cannot Be Considered.

Post-promulgation discussions at Special Commission meetings, especially those taking place many years after the Convention was adopted, are not an authoritative guide to the Convention's interpretation. Because the Convention confers no special authority on these Commissions, the views of those present do not constitute "agreements of the Parties" for purposes of treaty interpretation. What is envisioned here is formal agreement by the States Parties to a particular Convention, not simply the views of a number of delegates who attend a meeting on implementation. Nor does such Special Commission discussion amount to "subsequent practice." [34]

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[34] Relevant "practice" includes caselaw and similar acts of State authorities, not mere statements of meeting participants. Such practice, moreover, must evidence the agreement of the parties *as a whole* regarding the interpretation of a Convention; the views of only some of them, even a majority, are not sufficient. *See* Art. 31(3)(b); Vienna Convention on the Law of Treaties, International Law Commission Commentary, 2 ILC Yearbook 1066 ¶¶ 14-15, at 221-22. The Commission reports, moreover, are not necessarily an accurate guide to relevant caselaw; for example, the United States is referenced as a country that regards *ne exeat* orders as constituting joint custody. Permanent Bureau Amicus Br., 13. The Permanent Bureau does not represent the States Parties but is rather a

The central function of Special Commissions is to enhance cooperation between administrative bodies' (Central Authorities), improvements in Convention operations, especially by facilitating the services mandated by Articles 6-10.[35] Because many Central Authorities are not staffed by lawyers or do not take part in return proceedings, and parties are not required to route their Convention claims through any Central Authority, delegates at Special Commission meetings may even be unaware of their courts' decisions.

Further, there are differing forms of Convention membership that render any general legal effect beyond educational value to discussions or resolutions at Special Commission meeting quite implausible.[36] The Convention contains an innovative provision that permits accession to it by countries that were not yet members of the Hague Conference when the Convention was promulgated and by those that remain nonmembers.[37] In such cases, existing parties to the Convention may choose whether to accept such accessions as creating treaty relations. A large percentage of those now parties to the Convention consists of states that, therefore, do not belong to the original multilateral treaty, but

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staff secretariat. STATUTE OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW arts. 4(1)-(2), 6.

[35] *See supra* n.5 (Bruch, *Central Authority*).

[36] Recognizing this, the Permanent Bureau has undertaken judicial education activities.

[37] *See* Arts. 37 (ratification), 38 (accession).

rather to bilateral treaties with countries that have accepted their accession.[38]

The Special Commission discussions therefore are not an authoritative aid to interpretation of the "right of return" and "rights of custody."

III. The Weight of Persuasive Foreign Law Does Not Support Interpreting Travel Restrictions as Custody Rights under the Convention.

We are troubled by inaccurate descriptions of much of the foreign law invoked in several briefs and in many Convention opinions. In many cases, the accurate assessment of foreign caselaw is difficult or debatable. As best we can determine, however, the picture is much more nuanced than has been claimed – one that is far from uniform or compelling.[39]

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[38] Of the current 81 contracting parties, 26 ratified, 49 acceded (27 Conference members; 22 others), 5 are successors to the previous memberships of Yugoslavia and Czechoslovakia, and China is listed as a continuation member. *See* Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Status Table, *available at* http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24.

[39] Some of the materials cited by Petitioner are unavailable in English, and it is unclear whose analysis supports the representations (often mistaken) as to their content. Others are cited incorrectly, and we could locate only some of them. To secure trustworthy information on foreign sources and legal analysis, therefore, in addition to employing our own linguistic skills, we have consulted law professors and practitioners with bilingual or specialized knowledge and training, each of whom is also trained in the common law tradition. Whenever possible, we secured two independent readings of foreign language

Because there is ready availability to most of the English language materials, and ample analysis of most of them exists in the briefs already before the Court and in the caselaw, we focus on the foreign language materials.

Many of the foreign cases cited for the proposition that a *ne exeat* provision confers a right of custody on a parent who otherwise has only visitation rights, contain no such holding. Many involve joint custody rights instead, which are expressly recognized as rights of custody in Article 3 of the Convention. One, a case from the South African Constitutional Court, involves a contingent custody transfer.[40] The two French cases appear to disagree, not adding anything to a search for consistency.[41]

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materials. The International Child Abduction Database (INCADAT), operated by the Hague Conference's staff, makes leading Convention decisions accessible. Although English language summaries are also given, we noted many serious discrepancies with information received from our foreign experts.

[40] *Sonderup v. Tondelli* 2001 (1) SA 1171 (CC) (miscited as 2000). *See also* E-mails from Carina DuToit, Attorney, Centre for Child Law, Univ. of Pretoria, to Prof. Bruch (Nov. 5, 6, 2009).

[41] *Proc. Rép. c. Mme. Y*, T.G.I. Périgueux, Mar. 17, 1992, D. 1992, p. 315 (Fr.), held that a *ne exeat* right conferred no custody right and, accordingly, that return was unavailable. The court noted the negative impact on a custodial parent's mobility if a *ne exeat* order were to confer a right of custody. An earlier French case cited by Petitioner, *Proc. Rép. c. M.B.*, Cour d'Appel d' Aix-en-Provence (6e Ch.) 23 March 1989, 79 Rev. crit. 1990, 529 note Y. Lequette (Fr.) provided so little analysis in reaching its result that it is impossible to determine what factors influenced the court; indeed, given the few facts that the opinion discloses, it

A German Constitutional Court decision, BVerfG, NJW 1997, 3301 (2BvR 1126/97), is an example. A three-judge panel of the court returned the children because the Convention recognizes joint custody even if a parent has some but not all custodial rights, and, in this case, important questions of education and the children's upbringing had to be decided jointly. An earlier German decision in a case that was erroneously cited [42] also involved a joint legal custody order that expressly required joint decisions on important questions.[43] Similarly, in two decisions, the Israeli High Court (Supreme Court is the name of Israel's trial courts), *Turner v. Meshulam*[44] (which

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appears the court was most concerned with ensuring that the mother (the visiting parent) who sought their return was not deprived of her children.

[42] The cited case, OLG Dresden FamRZ 2003, 468, involves only the enforcement of an earlier decision that can be found at OLG Dresden FamRZ 2002, 1136 (cited incorrectly as 1163, however, in the enforcement case). Our statement of the facts is drawn from the controlling 2002 decision. Family law is federal law in Germany, so these state court decisions could have been appealed to the Federal Supreme Court (BGH), but apparently were not. *See* E-mails from Prof. Dr. Michael Coester, Ludwig-Maximilians-Universität München (Univ. of Munich) to Prof. Bruch (Nov. 5 and 8, 2009) (hereafter Coester).

[43] *See* NJW 1996, 1402 (15 Feb.1996); NJW 1996, 3145 (1 Aug. 1996) In none of these cases had the foreign court imposed a travel restriction. The latter decision held that a restriction on a parent's right to determine a child's residence in a joint custody case does not violate the country's constitutional freedom of movement when weighed against the country's constitutionally imposed parental responsibilities. *See supra* n.42 (Coester, Nov. 5, 2009).

[44] Miscellaneous Civil Application 1648/92 *Turner v. Meshulam* D.46(3) 38. *See* E-mails from Dr. Rhona Schuz, Senior Lecturer and Co-Director, The Centre for the Rights of

Father cites as *Tournai v. Mechoulam*) and *Foxman v. Foxman*, enforced travel restrictions.[45] But because each father held joint custody rights that the court said necessitated their consent, neither case illuminates the question before this Court – whether a travel restriction confers custody rights under Article 5 on a party who otherwise holds only visitation rights.[46]

Most of these foreign language cases are relied upon by Petitioner as supporting his arguments in this Court.[47] In fact, however, most of their descriptions are misleading, as a careful comparison with the descriptions set forth here reveals.

Other cases, although correctly cited, illustrate potential problems in attributing custody rights to a parent who otherwise has only visitation. These cases demonstrate that the "right of return" under the Convention is ill-suited to address the problems of custody and access. It may be that travel

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the Child and the Family, Sha'anei Mishpat College to Professor Bruch (Nov. 3 and 19, 2009).

[45] *Turner* states expressly that it follows *C v. C* [1989] 1 WLR 654; *Foxman* follows *Turner* and cites Article 5; *see also* E-mail from Edwin Freedman to Elisabeth McKechnie (Nov. 4, 2009).

[46] *Cf. Thomson v. Thomson* [1994] 3 S.C.R. 551 (Can.), which recognized a custody right in a Scottish court that had granted interim custody to the mother pending the court's decision on the merits. *Thomson* held that the father could rely on the court's custody rights, but also made clear that it would recognize no custody rights once the proceedings were concluded.

[47] Pet.'s Br. 35-36.

restrictions, and international litigation if they are breached, occur disproportionately in situations of high parental conflict. Although the following cases are merely anecdotal, early studies suggest this is the case.[48]

An example is OGH May 2, 1992 2Ob596.91, where the Austrian Supreme Court held the father had a right to a return order when the mother violated a travel restriction in an English sole custody order that expressly required his consent to a move abroad. This is a case that supports Father's claim in *Abbott*. The Austrian court, however, refused to return the children, holding that a valid defense was established under Article 13*b*, which allows the court to refuse a return if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

Travel restrictions are increasingly used to protect convenient visitation.[49] Their negative implications for women's mobility were identified in a Canadian Supreme Court decision, where the court

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[48] *See infra* n.55, n.56; *see also* J. Edleson et al., *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the U.S. for Safety: A Study of Hague Convention Cases*, (Draft Final Report to the National Institute of Justice) (Univ. of Minn. 2009) (Ninety-two percent of Convention cases with abuse allegations involved American mothers returning to the US. Eighty percent of the fathers who sought return orders were foreign citizens. More than half of these children were returned, and their abusive fathers received custody pending trial of all but one).

[49] The Austrian and South African cases are examples.

made clear that it will not treat travel restrictions as custody rights if no custody action is currently pending.[50]

Retired Canadian Supreme Court Justice Claire L'Heureux-Dubé points out a particular concern with orders that restrict relocation for women:

> [they] can be used by abusers in order to maintain continued control over estranged spouses and children.[51]

The same problems, including similar efforts by abusers to control their former partners, also exist around the world, and scholarly articles now address their implications for the welfare of children and the women who care for them. Some also expose the flaws in pseudo-scientific doctrines that are often said to necessitate travel restrictions.[52]

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[50] "The Convention does not give access the same protection as custody because of possible disruption to the child and the implications for the custodial parent's mobility." *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (Can.) (LaForest, J.) (L'Heureux-Dubé, J.) (concurring to emphasize the point).

[51] Justice Claire L'Heureux-Dubé, "Cherishing Our Children," (2001), 8, *available at* http://www.childjustice.org/docs/dube2001.pdf; *see also* Weiner, Merle, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000).

[52] *See, e.g.*, Carol S. Bruch, *Sound Research or Wishful Thinking? Lessons from Relocation Law*, 40 FAM. L.Q. (2006) (collecting recent scholarly research on children's needs and distinguishing unscientific doctrines).

The cases cited, moreover, represent only a small fraction of the Convention Parties. The cases from countries that apply common law methodology to provide custody rights from travel restrictions arise in only seven of the 81 countries that now belong to the Convention. These decisions come almost exclusively from countries that apply common law methodology to Convention litigation and often defer to decisions of the English courts.

In these cases, an opinion from the Court of Appeal and a later one in the House of Lords, come to a conclusion sharply different from that of the Canadian Supreme Court and the uniform holding of this country's Circuit Courts of Appeal that have considered the question in sole custody cases. We agree with the reasoning of the Canadian Supreme Court, which carefully compares custody and visitation, considers the matter from the standpoint of the Convention's child-protection goals, and notes concerns for the gender-based implications of travel restrictions.

Because the countries whose decisions have been offered vary greatly in size and the number of Convention cases they confront, the current relative significance of their decisions, in practical terms, is revealed by Convention caseloads. They show that England and the six countries that follow its view, taken together, deal with roughly the same number of Convention cases as do the common law countries that hold a contrary view, Canada and the United States.[53] It may also be noted that courts in the

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[53] *See* Appendix A.

countries that wanted visitation rights to provide a right to return of the child (and lost soundly on that point) during the negotiations of the Convention are prominent among those that have, after ratifying the Convention, interpreted travel restrictions orders as granting rights of custody.

There is thus a genuine disagreement among the common law courts that have dealt with the question. Once corrected for misinformation and lacunae in the foreign law materials that have been cited to this and other courts, the civil law authorities on point are similarly divided.

We conclude that there is at present no persuasive "weight of common law authority" that favors granting custody rights when travel restrictions are present in what is otherwise a straightforward visitation case. There is instead a mélange of opinions from trial courts, intermediate courts, and supreme courts, most of them not on point, and many of them sadly lacking in analysis. In contrast are the uniform, carefully reasoned opinions of all the Circuit Courts of Appeal that have dealt with the issue in *sole* custody cases, and determined – correctly in our view – that the Convention does not provide a right of return for breach of *ne exeat* orders.

IV. Remedies for Violations of Travel Restrictions and Rights of Visitation Should Be Dealt with by Amendment or Protocol.

As a general rule, significant changes to treaties, however desirable, should be accomplished by

subsequent treaty or amendment, and not by reinterpretation. That is all the more true here, where the subject at issue – enforcement of rights of access – is complex, fraught with difficulties, and cannot adequately be addressed in a one-time, "one-size-fits-all" reinterpretation of the original Convention.[54] Because families come in many "sizes," a range of solutions should be made available.

The problems of enforcing visitation are real, and the desire to provide more relief to noncustodial parents is understandable and admirable. To seek an amendment of the Convention by a court decision that is contrary to its language and history, however, is both unwise and unnecessary.

It is unwise because travel restrictions are only a small part of the overall picture, and there are many other factors that must be considered. A decision to provide a right of return for violation of travel restrictions, standing alone, does not fit into any intelligible policy structure and harms important child-centered values. Moreover, it can only serve to complicate future negotiations to address coherently the larger problem. As law professors, many of us are active in law reform and, in our experience, when a complex area of law must be reworked, it is far easier to move forward if many options are still open than it

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[54] Professor Silberman agrees, arguing that a new protocol is necessary because of "confusion" regarding when, if ever, a *ne exeat* order creates a right of custody. Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L L.J. 41, 48 (2003).

is if it is necessary to "take back" gains one interest group or another believes it has already won, however counterproductive that intransigence may be.

One problem, for example, that needs to be confronted is that of continuing jurisdiction over the custodial parent.[55] Early research indicates that most abducting mothers do return with their children, even if they report that they are victims of domestic violence, while fathers (although making no allegations of domestic violence) do not.[56] Some children have therefore been sent back in their mother's care to await trial secreted in a battered women's shelter.[57] In other cases, the caregiver may

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[55] A California study reveals that, as a group, mothers who take their children are poor and without access to lawyers and mental health professionals who might assist them. Further, perhaps because they often belong to cultural groups that do not turn to the courts to resolve disputes, they often do not know that moving away with their children is against the law. Professor Weiner believed that the increasing number of cases in which a primary caretaker leaves with the children and alleges domestic violence may reflect the desperation of women who flee with criminal and civil consequences far from their minds, sometimes to hide from the abuser -- an insight borne out by the California study. *See* Janet R. Johnston et al., *Early Identification of Risk Factors for Parental Abduction*, JUVENILE JUSTICE BULLETIN 1, 4-5 (Mar. 2001) *available at* http://www.ncjrs.org/pdffiles1/ojjdp/185026.pdf.

[56] Reunite Research Unit, *The Outcomes for Children Returned Following an Abduction* (Sept. 2003).

[57] *See Murray v. Director of Family Service ACT*, (1993) F.L.C. 92-416 (Austl.); *Re M* (Abduction: Intolerable Situation) [2000] 1 F.L.R. 930 (22 March 2000) (Fam. Div.) (Eng.) (children returned; mothers under death threat).

not be able to return with the child for any number of reasons (visa or work permit problems, the needs of other children who live abroad, or personal danger to her).[58]

A host of other issues have also emerged in the thirty years since the Convention was drafted, including an increased understanding of children's needs in separated households, new custody and family forms, greater attention to gender-based disparities in family law, increasing sensitivity to the challenges of parenting as a visiting parent, fewer abductions between Convention countries by noncustodial parents and more by custodial parents, heightened concern for domestic violence cases, a burgeoning use of travel restrictions outside the Middle East, a loosening of international borders, and the development of the European Union, with new rules for custody jurisdiction and a uniform family law for its member states.

Any requirement to send the child to a non-custodial parent must also address in depth and with sensitivity such questions as what to do about "supervised visitation" and perceived risks to the child. Studies completed since 1980 reveal a surprisingly high incidence of serious problems such as substance abuse, child or sexual abuse and

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[58] If the child in this case is returned to Chile, for example, it is perhaps unlikely that the court that twice refused even joint custody to Father would now grant custody to him. We do not know, however, whether Mother, who filed for divorce in Texas and is probably no longer married to Father, still holds a valid visa or would qualify for a new one to accompany their child and, if so, how she and the child could support themselves there.

domestic violence in disputed custody cases,[59] and even risks to children arising from visitation in some cases. An expert opinion solicited by the English Court of Appeal from two leading psychiatrists is particularly illuminating, as it identifies the advantages and disadvantages of visitation for children in a wide range of situations.[60]

Two recent cases illustrate that things can go very wrong if a focus on children's needs is lost. One entailed 17 months in foster care for children who were returned to their visiting father's community. Their mother, who stayed away because of criminal charges, was ultimately granted custody.[61] In the second, an abused woman who accompanied her young children when they were ordered returned feared for her life. Having begged police for a ride to a shelter, she was killed in front of her mother and sons as they were about to drive there by themselves.[62]

Thus, notwithstanding the importance of visitation as a general rule, there are a number of

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[59] *See supra* n.28 (Bruch, *Unmet Needs, passim*).

[60] It is difficult to locate in this country, but important in order to illustrate the greater complications of enforcing access rights. We have therefore sent a letter requesting permission to lodge a copy of the opinion with the Court, as it was later published. Sturge & Glaser, *Contact and Domestic Violence* (2000) FAM LAW 615 (2000), *available at* http://www.law.ucdavis.edu/faculty/Bruch/files/AppendixD.pdf.

[61] *Available at* http://fathersforlife.org/cps/apprehension3.htm.

[62] *Available at* http://www.brisbanetimes.com.au/world/young-mother-fled-to-sydney-to-save-her-life-20090501-aq5z.html.

caveats, issues and questions, which call for the kind of more detailed consideration and drafting that is only possible in the context of a negotiation.

The question of amending or replacing the Convention has been discussed at The Hague during official meetings, and last spring at a Council meeting, staff were directed to move forward with a feasibility study.[63] Such instruments hold a better promise of adequately addressing the myriad problems of enforcing rights of access; a reinterpretation of the Convention that establishes a blanket rule for travel restrictions is not a wise or adequate substitute.

CONCLUSION

We conclude that the clear language of the Convention instead, when read in good faith and taken in context, given the structure and purposes of the treaty as well as the negotiating history, dictates the correct result: a holding that the presence of a *ne exeat* provision does not confer rights of custody on a party who otherwise holds only visitation rights.

This conclusion is also supported by the record of the negotiations and the amicus brief submitted by two of the original drafters. The foreign caselaw, taken as a whole, fails to provide a consistent weight of authority that deserves this Court's deference. The contrary interpretation urged by the Petitioner is neither wise nor necessary. Given the many complexities surrounding the important question of

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[63] *See supra* n.8.

enforcing access rights, the enforcement of travel restrictions for noncustodial parents should be considered not by reinterpretation of the Convention, but in the broader context of considering a protocol or revised treaty to addresses the larger questions.

Because of deficiencies in the record that we identify throughout this brief, we also conclude that dismissal as improvidently granted would be an appropriate alternative disposition.

Respectfully submitted,

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November 24, 2009

APPENDIX A

Cases Addressed to the Central Authorities in 2003[1]

COUNTRY	INC. RETN	INC. ACCSS	OUT. RETN	OUT. ACCSS	TOTAL APPS.
U.S.	286	59	85	21	451
CANADA	56	11	55	14	136
SUBTOTAL	**342**	**70**	**140**	**35**	**587**
AUSTRALIA	43	19	91	14	167
ENG & WALES	142	17	148	43	350
SCOTLAND	12	0	3	0	15
IRELAND	33	2	23	0	58
ISREAL.	13	2	25	3	43
N.Z.	27	6	25	10	68
SO AFRICA	11	3	12	4	30
SUBTOTAL	**281**	**49**	**327**	**74**	**731**
TOTAL	**623**	**119**	**467**	**109**	**1318**

Inc. = Incoming cases; Out.= Outgoing cases; Retn.= Return applications; Accss=Access cases

[1] Numbers are drawn from NIGEL STOWE, A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2003 UNDER THE HAGUE CONVENTION OF OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, NATIONAL REPORTS (2007), *available at* www.hcch.net/index_en.php?act=publications.details&pid=4866&dtid=32. They are only approximations. Because parties are not required to route petitions through any Central Authority, may file return petitions directly in the Central Authority of the country in which they believe the child may be located, or may file directly in a competent authority in that country, there is no way to know how many cases overall were brought in any of these states during 2003. It is possible, for example, that in this table, an incoming case in the US will also be listed as an outgoing case in Australia. If the incoming case came instead from the Central Authority of a state not listed here (for example, the Central Authority of Hungary), or came directly to the US Central Authority from someone abroad who chose not to approach the home Central Authority, the chart does not reveal it.

APPENDIX B

BCN Legislación chilena

emita en la sentencia un pronunciamiento sobre cada una de ellas, aunque no hubieren sido incluidas sido incluidas in la demanda respectiva o deducidas por vía reconvencional. El tribunal hará lugar a esa solicitud, a menos que no se den los presupuestos que justifican su regulación.

Para estos efectos, las acciones que hubieren dado lugar a la interposición de la demanda se tramitarán conforme al procedimiento que corresponda, mientras que las demás se sustanciarán por vía incidental, a menos que el tribunal, de oficio o a petición de parte, resuelva tramitarlas en forma conjunta.

NOTA:

El artículo final de la LEY 19947, publicada el 17.05.2004, dispone que las modificaciones efectuadas a la presente norma, entrarán en vigencia seis meses después de su publicación.

Art. 49. La salida de

menores desde Chilen deberá sujeterse a las normas a que en este artículo se señalan, sin perjuicio de lo dispuesto en la Ley Nº 18.703. Si la tuición del hijo no ha sido confiada por el juez a alguno de sus padres ni a un tercero, aquél no podrá salir sin la autorización de ambos padres, o de aquel que lo hubiere reconocido, en su caso. Confiada por el juez la tuición a uno de de los padres o a un tercero, el hijo no podrá salir sino con la autorización de aquel a quien se hubiere confiado. Regulado el derecho a que se refiere el artículo 229 del Código Civil por sentencia judicial o avenimiento aprobado por el tribunal, se requerirá también la autorización del padre o madre a cuyo favor se estableció.

L.19.585
Art. 5º, Nº 5
letra a)
L.19.585
Art. 5º, Nº 5
letra b)

L 19.585
LEY 19711
Art. unìco Nº 3
D.O. 18.01.2001

El permiso a que se refieren los incisos anteriores deberá prestarse por escritura pública o por escritura privada autorizada por un Notario Público. Dicho permiso no será necesario si el menor sale del país en compañia de la persona o personas que deben prestarlo.

En caso de no pudiere

otorgase o sin motivo plausible se negare la autorización por uno de aquellos que en virtud de este artículo debe prestarla, podrá ser otorgada por el juez de letras de menores del lugar en que tenga su residencia el menor. El juez, para autorizar la salida del menor en estos casos, tomará en consideración el beneficio que le pudiere reportar y señalará el tiempo por el que concede la autorización.

Expirado el plazo a que se refiere el inciso anterior sin que el menor, injustificadamente, vuelva al país, podrá el juez decretar la suspension de las pensiones alimenticias que se hubieren decretado.

En los demás casos para que un menor se ausente del país requerirá la autorización del juzgado de letras de menores de su residencia.

Artículo 49 bis. – En la sentencia el juez podrá decretar que la autorización a que se refiere el inciso sexton del artículo anterior habilita al padre o madre que la haya requerido y que tenga al menor a su cuidado para salir del

país siguientes, siempre que se acredite que el otro progenitor, injustificadamente, ha dejado de cumplir el deber, reguulado judicial o convencionalmente, de mantener una relación directa y regular con su hijo. El plazo de permanencia del menor de edad en el extranjero no podrá ser superior a quince días en cada ocasión.

Ley 20303
Art. UNICO
D.O. 24.09.2009
L. 18.802

AMICUS CURIAE BRIEF

(12)

No. 08-645

FILED
SEP 22 2009
THE CLERK

IN THE

Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,
Petitioner,

v.

JACQUELYN VAYE ABBOTT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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INTEREST OF *AMICUS CURIAE* [1]

The National Center for Missing and Exploited Children ("NCMEC") was established by Congress in 1984 as a private, non-profit 26 U.S.C. § 501(c)(3) organization to assist law enforcement and families in the prevention of child abductions, the recovery of missing children, and the provision of services to combat child sexual exploitation. NCMEC works in cooperation with and is funded by the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention.[2] NCMEC has been designated by Congress as "the official national resource center and information clearinghouse for missing and exploited children"[3] and works with federal, state, and local law enforcement agencies, state missing children clearinghouses, and international law enforcement agencies. NCMEC also works frequently with foreign government entities, including the formally designated Central Authorities of Hague Convention contracting states, on cases of international family abduction.[4] This network enables NCMEC to transmit information regarding missing and exploited children

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amicus curiae* attests that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. U.S. Sup. Ct. R. 37.6 (2009). No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties received notice at least ten days prior to the due date of NCMEC's intention to file this brief. Respondent's consent letter is on file with the Clerk of Court, and Petitioner's consent letter is being filed with this brief.

[2] 42 U.S.C. § 5773(b) (2009).

[3] *Id.* at § 5773(b)(1)(B).

[4] 42 U.S.C. § 5771(5)(C) (2009).

to law enforcement and other international agencies around the world. Pursuant to the mandate of Congress, NCMEC tracks numbers of missing children cases, including international family abductions, and reports these numbers annually to Congress.[5]

Beginning in 1995, NCMEC processed cases under the Hague Convention on the Civil Aspects of International Child Abduction[6]— both incoming (those in which a parent abducts a child into the United States from a contracting state) and outgoing (those in which a parent abducts a child from the United States to a contracting state). NCMEC's work on incoming cases was performed on behalf of the United States Department of State pursuant to a cooperative agreement among the United States Department of State, the United States Department of Justice, and NCMEC. In April 2008, the United States Department of State assumed primary responsibility over all incoming Convention abduction cases, but NCMEC continues to handle outgoing Convention cases.

From 1995 to April 2008, NCMEC handled approximately 5,600 incoming Convention cases and over 2,300 outgoing Convention cases. NCMEC has assisted left-behind parents with assembling their applications for relief under the Convention, securing legal counsel, obtaining law enforcement and social services as needed, and obtaining clarification of foreign custody laws from foreign authorities. During its long involvement in working on Convention cases, NCMEC has established relationships with Central Authorities, legal representatives, and other agencies

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[5] 42 U.S.C. § 5773(b)(1)(F) (2009).

[6] See Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. (hereinafter "the Convention").

in many Convention contracting states. These relationships are essential to NCMEC's ongoing work in ensuring the prompt return of children abducted from the United States to foreign countries.

The resolution of the issue presented in this case will have a profound effect on the efficacy and practical operation of the Convention and on the ability of left-behind parents to obtain return of their abducted children through the international civil remedy provided by the Convention. NCMEC has a strong interest in ensuring that contracting states interpret the Convention consistently and that children who are "wrongfully removed" or "wrongfully retained" within the meaning of the Convention are returned to their countries of habitual residence.

SUMMARY OF ARGUMENT

The purpose of this brief is twofold:

First, this brief describes the extent to which the Convention is built upon close cooperation among Convention contracting states. That cooperation necessitates reciprocity and uniformity in interpretation of the Convention.

Second, this brief argues that the *ne exeat* right — a right recognized in many contracting states—is a "right of custody" within the meaning of the Convention. The Convention's text, drafting history, and post-ratification treatment demonstrate that *ne exeat* is a right of custody. This is the emerging consensus among other contracting states. In the face of this consensus, a failure to recognize *ne exeat* as a right of custody would contradict the principles underlying the Convention. It would also deny many left-behind parents a unique international civil remedy intended

to be widely applicable. Finally, it would run counter to the Convention's animating principle: that a child's country of habitual residence has the final word in the resolution of custody disputes.

For these reasons, this Court should join the courts of other contracting states in their well-reasoned analysis of the Convention and hold that the *ne exeat* right is a right of custody under the Convention.

ARGUMENT

I. THE CONVENTION FUNCTIONS THROUGH THE COOPERATIVE EFFORTS OF ALL CONTRACTING STATES, AND INCONSISTENT INTERPRETATION OF *NE EXEAT* RIGHTS UNDERMINES THOSE EFFORTS

A. The Convention Is Designed to Return Wrongfully Removed Children to the Forum of Habitual Residence for Adjudication of Custody Disputes

The central purpose of the Convention and its implementing legislation, the International Child Abduction Remedies Act ("ICARA"),[7] is to return internationally abducted children to their countries of habitual residence for a determination of custody.[8]

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[7] 42 U.S.C. § 11603 (2009).

[8] Elisa Pérez-Vera, *Explanatory Report: Hague Conference on Private International Law*, 3 Acts and Documents of the 14th Session, 426, 429 ¶16 (1980) (translation of the Permanent Bureau) (hereinafter "Pérez-Vera Report"). The Pérez-Vera Report is recognized as an authoritative source for interpreting the Convention's provisions and as "the official history and commentary on the Convention." *Croll* v. *Croll*, 229 F.3d 133, 137 n.3 (2d Cir. 2000) (citing *Blondin* v. *Dubois*, 189 F.3d 240 (2d Cir. 1999); see also U.S. Dep't of State, Hague International

In accordance with this purpose, the Convention directs the court in which a Convention action is filed not to consider the merits of any underlying child custody dispute, but simply to determine the jurisdiction in which the parties must pursue resolution of the custody dispute. See Convention arts. 16, 19. This directive is predicated on a commitment to reciprocity and an understanding that courts of contracting states will enforce the Convention uniformly when presented with similar circumstances.

The Convention provides for the return of children who are "wrongfully removed" from their country of habitual residence. A child is "wrongfully removed" where the removal is in breach of "rights of custody." *Id.* at art. 3. The Convention defines "rights of custody" as including "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."[9] *Id.* at art. 5. Rights of custody "may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State" in which the child was habitually resident immediately before the removal or retention. *Id.* at art. 3.

Thus, the trial court is not empowered to resolve the custody dispute; rather, it must determine whether the petitioner has sufficient rights and obli-

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Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10503 (Mar. 26, 1986).

[9] "Rights of access," for which other, more limited remedies are available, are defined to include "the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention art. 5. The return remedy is not available for breach of rights of access. See Convention arts. 12, 21.

gations "under the law of the State in which the child was habitually resident" to give rise to "rights of custody" as defined by the Convention. *Ibid.* On such a finding (and absent the determination of any substantive defenses permitted under the Convention) the court must order prompt return of the child. *Id.* at art. 12.

B. In Practice, the Convention Is Facilitated by Cooperation Among Contracting States

The Convention is intended to create "a system of close co-operation among the judicial and administrative authorities of the Contracting States."[10] This cooperation is achieved in part through the contracting states' designated Central Authorities. See Convention art. 7. The Central Authorities are charged with exchanging information concerning a wrongfully removed or retained child, investigating the whereabouts of the child, adopting necessary provisional measures to prevent harm to the child, and, ultimately, providing appropriate administrative arrangements to facilitate the voluntary return of the child or otherwise securing an amicable solution. *Ibid.*

The United States has established cooperative relationships with the Central Authorities of other contracting states.[11] When a child is abducted from

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[10] Pérez-Vera Report at 435, ¶ 35.

[11] United States Response: Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2006). Available at http://www.hcch.net/index_en.php?act=conventions.publications&dtid=33&cid=24. See also U.S. Dep't of State, 2009 Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction ("Compliance Report") (Apr. 2009) at 16 (Brazil), 18 (Chile), 19 (Greece).

the United States to another contracting state, the United States Central Authority ("USCA") facilitates efforts to secure the return of the child.[12] In this regard, both NCMEC and the USCA may work with parents to file a return application,[13] contact the relevant foreign Central Authority directly to transmit application documents, and request assistance in locating the abducted child.[14] The foreign Central Authority will examine the return application and, if it accepts the application, will work with various local authorities to locate the abducted child before judicial or administrative proceedings pursuant to the Convention begin. In cases where a child is abducted to the United States, the Central Authority of the country of origin plays a corresponding role.

Once judicial proceedings under the Convention have commenced, the courts of the contracting states take the central role in determining whether the child should be returned. The collaborative spirit of the Convention continues at this stage, as courts may seek help from a foreign Central Authority in deter-

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Available at http://travel.state.gov/pdf/2009HagueAbductionConventionComplianceReport.pdf.

[12] U.S. Dep't of State Office of Children's Issues website at http://travel.state.gov/family/abduction/country/country_3056.html.

[13] U.S. Dep't of State Office of Children's Issues website at http://travel.state.gov/family/abduction/Solutions/Solutions_3850.html

[14] United States Response: Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2006). Available at http://www.hcch.net/upload/abd_2006_us.pdf. While the USCA generally submits Hague applications directly to the relevant foreign Central Authority, on occasion the USCA will work through American embassies abroad to transfer information to other Central Authorities. *Ibid.*

mining the meaning and content of that state's custody laws. The Convention requires each Central Authority to take "all appropriate measures" to "provide information of a general character as to the law of their State in connection with the application of the Convention." Convention art. 7(e). The Central Authorities may also help applicants obtain from a court of the child's habitual residence "a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention." *Id.* at art. 15. Such decisions can be submitted to the foreign court that is evaluating the Convention petition for return.

Contracting states' courts are charged with deciding cases in a timely manner, correctly applying the Convention's legal requirements, and enforcing decisions for return or access. See Compliance Report at 12. Consistent application of Convention principles is therefore particularly important, for no supranational body polices the Convention or adjudicates disputes over the meaning of the text. In recognition of this principle, courts frequently consider other contracting states' judicial decisions when rendering decisions under the Convention. See, *e.g.*, *Furnes* v. *Reeves*, 362 F.3d 702, 714 (11th Cir. 2004); *Fawcett* v. *McRoberts*, 326 F.3d 491, 500 (4th Cir. 2003); *Gonzalez* v. *Gutierrez*, 311 F.3d 942, 952 (9th Cir. 2002); *Croll* v. *Croll*, 229 F.3d 133, 143 (2d Cir. 2000); *Sonderup* v. *Tondelli* 2000 (1) SA 1171 (CC) at 24-25 (S. Afr.); *In the Marriage of: Jose Garcia Resina and Muriel Gislaine Henriette Resina*, Appeal No. 52, 1991, at 14 (Fam.) (Austl.).

C. Inconsistent or Erroneous Interpretation of *Ne Exeat* Rights Undermines the Operation of the Convention

Because the Convention operates as intended only if it is uniformly enforced, contracting states note faulty or inconsistent compliance with the Convention.

The United States Department of State, for instance, annually reviews contracting states' compliance with the Convention and identifies states that fail to consistently apply the tenets of the Convention. The resulting compliance report publicizes return statistics as well as the deficiencies of certain contracting states that are determined to be non-compliant with the Convention. The most common deficiency is judiciaries incorrectly adjudicating underlying custody disputes rather than returning the child to his or her country of habitual residence for resolution there. See, *e.g.*, Compliance Report at 15.

Contracting states can become frustrated when others apply the Convention inconsistently. For instance, in 2006 the Central Authority for Argentina complained, in response to the Questionnaire Concerning the Practical Application of the Hague Convention, that foreign courts' failures to recognize custody rights established by Argentinian law have been an obstacle to enforcement.[15]

The courts of contracting states likewise comment on other states' failure to uniformly apply the Convention. In *Doise* v. *Doise*, [1993] Carswell BC

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[15] Argentina Response: Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2006). Available at http://www.hcch.net/upload/abd_2006_ar.pdf.

1600 (B.C.S.C. Dec. 10, 1993), a Canadian judge criticized a German court for not enforcing a Canadian court order granting interim custody of the children to the father. The Canadian judge commented that based on the evidence presented to the court, the proceedings in Germany could be described as "a most unfortunate legal misadventure." *Id.* at ¶ 29. Similarly, in *M.A.M.D.* v. *C.F.H.L.*, [1999] Q.J. No. 4130, 60-63 (Quebec Super. Ct.) (Can.) a Canadian judge criticized the Austrian courts for not enforcing a *ne exeat* order. The Canadian court explained that the Austrian court had "failed to take into account that the mother did not have the right to remove the child from the jurisdiction of the province." *Id.* at ¶ 63. The Canadian court further commented that the Austrian courts' decisions were "contrary to the purpose of the Convention" and encouraged "recourse to illegal acts." *Id.* at ¶ 61.

United States courts also have complained of lapses by foreign courts in interpreting the Convention. In *Carrascosa* v. *McGuire*, 520 F.3d 249, 262-63 (3d Cir. 2008), the Third Circuit faulted a Spanish court for applying Spanish law to a Convention case involving a child wrongfully removed from the United States. The district court had termed the Spanish court's refusal to apply New Jersey law a "complete disregard of the principles of international comity." *Carrascosa* v. *McGuire*, No. 07-0355, 2007 WL 496459, at *10 (D.N.J. Feb. 8, 2007). The Third Circuit, agreeing, held that American courts therefore had no obligation to enforce the Spanish judgment. *Carrascosa*, 520 F.3d at 263. On a practical level, courts may be influenced by another contracting state's track record of noncompliance when deciding whether to return a child to its country of origin. See, *e.g.*, *Croll*, 229 F.3d at 143 n.6 (noting the "lack

of uniform interpretation," as evidenced by the high number of returns from the United States compared to the much lower rate of returns to the United States, in support of its decision not to return the child to her country of origin).

The Convention's purpose cannot be realized if it is inconsistently applied among contracting states. As the Reporter for the Convention wrote, "a system based on co-operation could work only if there existed amongst the Contracting Parties a sufficient degree of mutual confidence." Pérez-Vera Report at 437, ¶ 41. The need for uniformity is therefore an appropriate consideration when determining whether a *ne exeat* right constitutes a "right of custody."

II. THE NATURE AND SOURCES OF THE *NE EXEAT* RIGHT

The *ne exeat* right at issue here is commonly litigated in Convention cases. In its simplest form, *ne exeat* is a right held by one or both parents to prevent the other parent from removing a child from a jurisdiction without the consent of both parents. Many of the precedential decisions regarding *ne exeat* rights arise out of court orders containing *ne exeat* rights—see, *e.g.*, *Croll*, 229 F. 3d 133, *Furnes*, 362 F.3d 702—but depending on the law of the state at issue a *ne exeat* right also may arise through private agreements or operation of law.

United States courts historically have recognized and applied *ne exeat* rights in civil disputes "to effectuate a remedy by keeping a party within the jurisdiction of the court." *In re People ex rel. B.C.*, 981 P.2d 145, 148 (Colo. 1999) (citing 57 Am. Jur. 2d *Ne Exeat* § 2 (1988) and 65 C.J.S. *Ne Exeat* § 1.b (1986)); see also *Siravo* v. *Siravo*, 670 So. 2d 983, 984-85 (Fla.

4th Dist. Ct. App. 1996) ("Certainly utilization of this writ is a valuable resource in the arsenal of remedies available to a trial court in order to secure alimony and support."); *Chancer* v. *Chancer*, 124 N.E.2d 283, 285 (N.Y. 1954) (describing application of "this ancient writ" to secure defendant's presence at alimony proceedings). Although United States courts today rarely invoke *ne exeat* in non-familial matters, many United States jurisdictions permit the use of *ne exeat* orders to aid enforcement of domestic custody determinations by forbidding removal of a child from the jurisdiction. See, *e.g.*, *Goldman* v. *Greenwood*, 748 N.W.2d 279, 282 (Minn. 2008) (affirming validity of "locale restriction" in custody order); *In re People ex rel. B.C.*, 981 P.2d at 148 (holding writ may be used to enforce custody determinations); *Carrascosa*, 520 F.3d at 256 n.17 (describing New Jersey custody statute akin to *ne exeat* order); *Pielage* v. *McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008) (relating that Alabama court issued *ne exeat* order); *Wheeler* v. *Mazur*, 793 A.2d 929, 931-32 (Pa. Super. Ct. 2002) (describing issuance of *ne exeat* order).

Numerous foreign jurisdictions also recognize the *ne exeat* right. Indeed, the five contracting states with the highest incidence of abductions to the United States provide for *ne exeat* rights: Mexico, in which 121 new abductions to the United States were reported for 2008; Germany with 27 new incoming cases; the United Kingdom with 21; Canada with 19; and France with 13.[16]

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[16] Compliance Report at 11. For examples of *ne exeat* rights in these countries, see, for Mexico, *Gonzalez* v. *Gutierrez*, 311 F.3d 942, 947 (9th Cir. 2002) (recognizing a *ne exeat* clause arising by divorce agreement); Germany, *Shealy* v. *Shealy*, 295 F.3d 1117, 1120 (10th Cir. 2002) (recognizing a *ne exeat* right

Rights of *ne exeat* may arise by statute. In Canada, for example, the *ne exeat* right is established by the Criminal Code, which prohibits one parent from removing a child from the country without permission of the other parent.[17] These provisions apply irrespective of an existing custody order.[18] In the United Kingdom, the *ne exeat* right is conferred by a statute that precludes a parent from removing a child from the country for more than 28 days without the consent of both parents.[19] Furthermore, the judiciary in the United Kingdom may enforce *ne exeat* rights pursuant to Section 8 of the Children Act 1989.

In Argentina, the Civil Code establishes that when one parent has custody of a child, the consent of the other parent must be obtained before that child may be removed from the country.[20] Similarly, in Hungary, even where parents do not hold "joint custody" under Hungarian law, both parents are entitled to decide jointly substantial questions concerning the

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conferred by family court order); United Kingdom, *Navani* v. *Shahani*, 496 F.3d 1121, 1125 (10th Cir. 2007) (acknowledging a *ne exeat* right arising from family court custody order); Canada, *David S.* v. *Zamira S.*, 632, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991) (recognizing *a ne exeat* order from the secular courts of Ontario); France, *In re D.D.*, 440 F. Supp. 2d 1283, 1295 (M.D. Fla. 2006) (acknowledging *ne exeat* rights arising from French Civil Code art. 371-3).

[17] See Canadian Criminal Code R.S.C. 1985 c. C-46, §§ 282-283.

[18] See *id.*, § 283.

[19] Section 1, Child Abduction Act of 1984 (c. 37) (U.K.).

[20] Codigo Civil [Cod. Civ.] art. 264 (Arg.). According to the United States Department of State, Argentina was involved in 14 new cases in 2008, including 11 outgoing cases to Argentina and three incoming cases to the United States. Compliance Report at 40.

child, including the child's place of residence.[21] Consequently, the removal of a child abroad by one parent is unlawful even where the removing parent is the primary caregiver; such removal is considered a breach of the left-behind parent's right to jointly decide the child's place of residence.[22] The *ne exeat* right also arises by statute within the Greek Civil Code and prohibits the removal of a child from the country by the custodial parent absent the consent of the other parent.[23] In the Dominican Republic, the *ne exeat* right arises by operation of law, and courts require that permission for travel abroad of minor children or adolescents be given by both parents.[24]

Given the widespread existence of *ne exeat* rights, it is not surprising that such rights frequently are at issue in Convention cases litigated in the United States. Courts in the United States have issued opinions involving *ne exeat* rights arising in, for example, Hong Kong, Norway, Scotland, Panama, Belize, Colombia, Chile, Venezuela, Mexico, Germany, France,

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[21] Hungarian Family Code art. 72(B) §§ 1-2. According to the U.S. Department of State, Hungary was involved in four new cases in 2008, including two outgoing cases to Hungary and two incoming cases to the United States. Compliance Report at 40.

[22] Civil Board of the Supreme Court of the Republic of Hungary, Opinion no. 284(b)

[23] Art. 1520, Greek Civil Code; see also art. 950, ¶ 2 of Greek Civil Procedure Code. According to the United States Department of State, Greece was involved in one new incoming case to the United States in 2008. Compliance Report at 40.

[24] Law 136-03: Code for the Protection of the Rights of Children and Adolescents, art. 204 (Dominican Republic). According to the United States Department of State, the Dominican Republic was involved in 34 new cases in 2008, including 25 outgoing cases to the Dominican Republic and nine incoming cases to the United States. Compliance Report at 40.

Hungary, Greece, and Canada.[25] A lack of uniformity in the recognition of this widespread right as a "right of custody" could fundamentally weaken the Convention.

III. THE *NE EXEAT* RIGHT IS A RIGHT OF CUSTODY UNDER THE CONVENTION

In interpreting the Convention this Court should give effect to the shared expectations of its signatories. Determining this intent requires an evaluation of the Convention's text, drafting history, and post-ratification treatment. *Air France* v. *Saks*, 470 U.S. 392, 397-400 (1985); see also *El Al Isr. Airlines* v. *Tseng*, 525 U.S. 155, 167 (1999) (quoting *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)). These sources establish that the Convention's contracting states intended *ne exeat* to constitute a right of custody.

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[25] See *Croll*, 229 F.3d at 135 (Hong Kong); *Furnes*, 362 F.3d at 714 (Norway); *Fawcett*, 326 F.3d at 500 (Scotland); *Lalo* v. *Malca*, 318 F. Supp. 2d 1152, 1156 (S.D. Fla. 2004) (Panama); *In re Leslie*, 377 F. Supp. 2d 1232, 1246 (S.D. Fla. 2005) (Belize); *Aguirre* v. *Calle*, No. 08-2613, 2008 WL 4461931, at *5 n.7 (E.D.N.Y. Oct. 3, 2008) (Colombia); *Villegas Duran* v. *Arribada Beaumont*, 534 F.3d 142, 147-48 (2d Cir. 2008) (Chile); *Vale* v. *Avila*, 538 F.3d 581, 584 (7th Cir. 2008) (Venezuela); *Gonzalez*, 311 F.3d at 947 (Mexico); *Shealy* v. *Shealy*, 295 F.3d at 1120 (Germany); *In re D.D.*, 440 F. Supp. 2d at 1295 (France); *Viragh* v. *Foldes*, 612 N.E.2d 241, 248 (Mass. 1993) (Hungary); *Janakakis-Kostun* v. *Janakakis*, 6 S.W.3d 843, 846 (Ky. Ct. App. 1999) (Greece); *David S.* v. *Zamira S.*, 632, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991) (Canada).

A. The Convention's Text Evinces an Intent to Treat *Ne Exeat* Rights as Rights of Custody

Interpretation of a treaty begins with "the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 534-35 (1991) (quoting *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 699 (1988)); *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Ct.*, 482 U.S. 522, 534 (1987); *Air France*, 470 U.S. at 397. The meaning of the Convention's terms should be assessed "in the light of [the Convention's] object and purpose." Vienna Convention on The Law of Treaties, May 23, 1969, art. 31.1, 1155 U.N.T.S. 331, 340.[26]

1. *The Convention's Definition of "Rights of Custody" Expressly Includes the Right to Determine Place of Residence*

Under the Convention, "'rights of custody' . . . include rights relating to the care of the person of the child and, in particular, *the right to determine the child's place of residence.*" Convention art. 5(a) (emphasis added). Several aspects of this definition are notable. "Rights of custody" are defined very broadly, as rights "relating to" the care of the child. A parent need not be a child's primary caregiver in

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[26] The United States has not ratified the Vienna Convention on the Law of Treaties, but it has been "generally recognized as the authoritative guide to current treaty law and practice." United States Dep't of State, Letter of Submittal to the President, S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971). More importantly, this Court has independently adopted much of the Vienna Convention's basic framework for treaty interpretation. Compare Vienna Convention on the Law of Treaties, arts. 31.3, 32 with *El Al*, 525 U.S. at 167.

order to have "rights of custody" within the meaning of the Convention as long as the parent has rights "relating to" the child's care. Indeed, the Convention elsewhere recognizes that rights of custody need not be held solely by one parent, but may be held and exercised by more than one person. *Id.* art. 3(a) (recognizing that rights of custody can be held jointly). The result is an expansive definition of "rights of custody" that is specific to the Convention. These rights are not necessarily identical to, and may be more inclusive than, whatever rights are thought of as custody rights within any individual state's legal system.[27]

Most critically for purposes of this case, the definition of "rights of custody" in Article 5(a) specifically includes "the right to determine the child's place of residence." This is precisely the right that a *ne exeat* order affords. The holder of a *ne exeat* right may unilaterally decide that the child will reside in the country of habitual residence and not in any other.

One might argue that the right to determine the country in which the child will live cannot be read as a right to determine the "place of residence" because the parent cannot determine the specific location within that country. But in the context of the Convention, which is concerned with the country of residence, that argument is unavailing; given the international context of the Convention, "place of

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[27] See Hague Conference on Private International Law, Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 29 I.L.M. 219, ¶ 9, at 222 (1990).

residence" necessarily refers to the country of residence. The court in *Furnes* explained:

> In light of the context of the Hague Convention, we believe that the right to determine whether the child lives within or outside Norway constitutes a right to determine the child's place of residence. The Hague Convention was designed to provide a remedy not for whether Jessica should live in Bergen or Oslo within Norway (Reeves's right), but for whether Reeves should be able to take Jessica across international borders. Thus, in our view, the only logical construction of the term "place of residence" in the Convention would necessarily encompass decisions regarding whether Jessica may live outside of Norway. *Therefore, what country a child lives in, as opposed to what city or house within Norway, constitutes a right to determine a child's place of residence under Article 5 of the Convention and thus a right of custody under the Convention.*

Furnes, 362 F.3d at 715 (emphasis added). See also *Lieberman* v. *Tabachnik*, 625 F. Supp. 2d 1109, 1123 (D. Colo. 2008) ("The Convention is not concerned with where a child resides within the country of their habitual residence. Thus, I find that the only logical construction of the term 'right to determine place of residence' in the Convention must encompass decisions regarding whether a child may live outside of their country of habitual residence.").

Furthermore, the "veto" nature of the right allows the holder of the right to specify the precise circumstances under which the holder will refrain from exercising the right. The holder of the right may, for example, specify that the other parent may take the

child abroad on the condition that they live in a particular foreign country. See, *e.g.*, *Croll*, 229 F.3d at 145 (Sotomayor, J., dissenting) (holder of the right "can use his veto power as leverage to influence [the other parent's] selection of the destination country"). Indeed, although a right to determine the country of residence sufficiently establishes a right of custody, the holder of a *ne exeat* right potentially could determine not only the country of residence, but also the city, town, or even the neighborhood of residence. See *Furnes*, 362 F.3d at 715 (noting that petitioner could condition the child's removal on her living "in a particular city or near a particular airport, or even on the condition that she live in a particular house" in the other country); see also *C* v. *C*, [1989] 1 W.L.R. 654 at 5 (England C.A.) ("The other parent [with the *ne exeat* right] would have some control over not only the child leaving the jurisdiction but also as to the place to which the child was going, and not only the country; for instance, to live in London in suitable circumstances.").

That the *ne exeat* right amounts to less than complete control over a child's place of residence is immaterial under the Convention, for a right of custody may be shared between parents. Where a *ne exeat* order is in place, *neither* parent has an unlimited right to determine a child's place of residence; the rights to determine residence are held jointly—a possibility that the Convention explicitly acknowledges and that in no way diminishes the *ne exeat* right's status as a "right of custody." See Convention art. 3(a) (stating that rights of custody may be held "either jointly or alone"). In this respect, the right of determination arising under a *ne exeat* order resembles many other common custodial arrangements in which neither parent has sole decision-making power.

For example, under joint legal custody arrangements, parents share decision-making rights and responsibilities. See, *e.g.*, *Zitnay* v. *Zitnay*, 875 A.2d 583, 587 (Conn. App. Ct. 2005) (stating that joint legal custody involves "equal sharing of decisions regarding a child's welfare, such as education, religious instruction and medical care"); *Johnson* v. *Johnson*, 865 S.W.2d 412, 417 (Mo. Ct. App. 1993) (explaining that under the statutory definition of "joint legal custody," parents share the decision-making relating to the education, health and welfare of the child).

2. *Under the Convention, the Ne Exeat Right Is a "Right of Custody" Not a "Right of Access"*

A comparison of "rights of custody" with "rights of access" also supports the conclusion that the *ne exeat* right is a right of custody. "Rights of custody" under the Convention "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." "Rights of access" include "the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention art. 5.[28]

The *ne exeat* right is not a right to take the child temporarily from his or her habitual residence; the holder of a *ne exeat* right may not even have visitation rights. The remedy for a violation of access rights—allowing a parent access to the child, as provided in Article 21 of the Convention—does not cure the violation of a *ne exeat* right. Only the

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[28] The United States Department of State has characterized "rights of access" as mere "visitation rights." United States Dep't of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494 (Mar. 26, 1986).

remedy provided for violation of rights of custody—namely, return of the child to the country of habitual residence—addresses the specific harm done by a removal in violation of a *ne exeat* order and restores the left-behind parent's rights.

B. The Convention's Drafting History and Opinions of Courts from Other Contracting States Demonstrate that *Ne Exeat* Is a Right of Custody

To the extent the language of the Convention is ambiguous, the Court may consider the Convention's drafting history and post-ratification treatment. *Air France* 470 U.S. at 397, 400; see also *El Al*, 525 U.S. at 167 (quoting *Zicherman*, 516 U.S. at 226).

1. The Drafting History Demonstrates the Drafters' Intent that "Rights of Custody" Encompass the Ne Exeat *Right*

The drafting history suggests that the first Convention signatories believed *ne exeat* rights would be protected by a right of return. In reference to a hypothetical situation parallel to the underlying facts in this case, Convention drafters believed that the right of return was available. During negotiations of the Convention, the Canadian representative observed that under his reading of the Convention, when a *ne exeat* order is in place, "[i]f the mother nevertheless leaves the jurisdiction [with the child] without [the father's] consent, that constitutes wrongful removal." Hague Conference on Private International Law, Actes et Documents de la Quatorziéme Session, Tome III, at 266 (1980). The participants agreed that "under the present terms of the Convention, the abducted child would have to be sent back immediately." *Ibid.*

The drafters also contemplated that the right to care for the person of the child could be vested in one person, while another held the right to determine a child's residence—with both rights recognized as "rights of custody" under the Convention. *Id.* at 271 (Mr. Eekelaar, the representative for the Commonwealth Secretariat, stated that the right to care for a child and the right to determine place of residence might be held by different people, but that the drafters' intent was to protect the custody rights of each), 344 (Mr. Dyer, first secretary at the Permanent Bureau, stated that the Convention allowed two individuals to separately maintain custody rights).

2. *The Preponderance of Contracting States' Courts to Have Considered the Issue Have Held that the* Ne Exeat *Right Is a Right of Custody*

Examination of other states' interpretations of "rights of custody" is particularly appropriate given the Convention's cooperative framework. Congress acknowledged "the need for uniform international interpretation of the Convention,"[29] a goal that cannot be achieved without reference to international decisions.

Foreign precedents support the position that the *ne exeat* right is a right of custody. In its *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice*, the Permanent Bureau of the Hague Conference on Private International Law stated that "the preponderance of the case law supports the view that a right of access combined with a veto on the removal of a child from the juris-

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[29] 42 U.S.C. §11601(b)(3)(B) (2009).

diction constitutes a custody right."[30] The Permanent Bureau observed that these cases are based on the wording of Article 5(b) and a concern that an alternative rule "would seriously weaken the Convention." *Ibid.* According to the Permanent Bureau, this alternate interpretation, that the *ne exeat* right is not a right of custody, "does not command widespread support." *Ibid.*

In *Sonderup* v. *Tondelli*, 2000 (1) SA 1171 (CC) (S. Afr.), a South African court considered a *ne exeat* decree issued by a Supreme Court of British Columbia. In ordering that the child be returned to British Columbia, the South African court relied explicitly on the *ne exeat* decree, which it construed as a "right to determine the child's place of residence." *Id.* at 24-25. The South African court also cited favorably to Judge Sotomayor's dissent in *Croll*, stating that "when a parent takes a child abroad in violation of *ne exeat* rights, that parent effectively nullifies the custody order of the country of habitual residence—exactly the mischief the Convention seeks to avoid." *Id.* at 25. Similarly, in *Oberster Gerichtshof* [OGH] [Superior Appellate Court] May 2, 1992, 2 Ob 596/91 (Austria), the Superior Appellate Court of Austria determined that a divorce order granting full custody to the mother but holding that the children could not leave England without a court order or consent of the father was sufficient to constitute a right of custody according to Articles 3 and 5 of the Convention. *Id.* at 4.

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[30] *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice*, Permanent Bureau of the Hague Conference on Private International Law § 9.3 (2008), available at http://www.hcch.net/upload/guidecontact_e.pdf.

An English court discussed the issue in depth in *C* v. *C*, [1989] 1 W.L.R. 654 (Eng. C.A.). In that case, a mother who had been granted primary custody of the child brought the child from Australia to England in violation of a *ne exeat* decree. In holding that the child should be returned to the father, Lady Justice Butler-Sloss specifically held that the *ne exeat* order gave the father "the right to determine that the child should reside in Australia or outside the jurisdiction at the request of the mother" and that this right constituted a right of custody under the Convention. *Id.* at 5.

A similar case from Scotland relied in part on *C* v. *C* in reaching the same conclusion. In *A.J.* v. *F.J.* 2005 CSIH 36 (Scot), the Scottish Court of Session, Second Division, held that a statutory *ne exeat* right bestowed on the mother the right to determine the children's place of residence, despite the fact that the father was given primary custody. Lord Clarke therefore held that the mother had "custody rights" for the purposes of Article 3 of the Convention. *Id.* at ¶¶ 12-13.

In *M.S.H.* v. *L.H.*, [2000] 3 I.R. 390 (July 27, 2000) (Ir.), the Supreme Court of Ireland considered the rights of a father who had been imprisoned for several years and had very limited contact with his children in England. After the mother removed the children to Ireland, the father sought their return on the grounds that a *ne exeat* decree imposed as part of the parties' divorce action prohibited the children from being removed from England. Justice McGuinness determined that the father's rights under the *ne exeat* order constituted custody rights and were not nullified by the fact he was not playing a large part in the physical day-to-day care of the

children. *Id.* at 2. Justice McGuinness cited various other examples where a parent might have a low-level input into the day-to-day care of a child: where a parent was disabled, incapacitated by sickness or accident, or in a job that necessitated long absences from home. The fact that the father saw the children infrequently did not divest him of the custody rights conferred under the *ne exeat* order. *Ibid.*

Courts also have taken into account the desirability of maintaining a uniform approach when determining that a *ne exeat* right is a right of custody. In *In the Marriage of: Jose Garcia Resina and Muriel Gislaine Henriette Resina*, Appeal No. 52, 1991 (Fam.) (Austl.), for example, the Family Court of Australia cited favorably to *C* v. *C* in finding that a *ne exeat* right constituted a right of custody such that a court must order the return of a child to the country of habitual residence. In considering the rights conferred by the *ne exeat* order, the court acknowledged the international spirit of the Convention and ordered that the children should be returned to their father in Australia, stating that "[t]he reasoning adopted by the Court of Appeal in *C* v. *C* should be applied in Australia both for reasons of uniformity of interpretation and having regard to the spirit and intendment of the Convention. Consequently, the injunctive order of April 1990 constituted a 'right of custody.'" *Id.* at 14. See also *Sonderup*, 2000 (1) S.A. 1711 at ¶ 21 (stating that "it has been held by courts in several jurisdictions that such a non-removal provision can, depending on the circumstances, confer a right of custody within the meaning of the Convention").

Respondent asserted in her Brief in Opposition that there is no consensus among contracting states because of certain court decisions in Canada and France. See Opp. Br. 15-16. But as explained in the Brief for the United States as *Amicus Curiae* in support of the petition for certiorari, the Canadian courts' comments about *ne exeat* orders were not part of their holdings, since neither court was faced with the issue of a parent violating a *ne exeat* order after a final custody determination. See U.S. Br. 14-16. The French decision cited by Respondent conflicted with a prior French appellate court decision. See U.S. Br. 15-16. Accordingly, these decisions fail to support Respondent's description of a serious divide among contracting states about whether *ne exeat* rights are rights of custody.

International decisions thus support the treatment of *ne exeat* rights as rights of custody. The countries rendering these decisions are active Convention partners of the United States: in 2008, Australia was involved in 27 cases with the United States (18 outgoing to Australia, nine incoming to the United States); the United Kingdom was involved in 63 (42 outgoing and 21 incoming); South Africa, 11 (five outgoing and six incoming); and Israel, 17 (12 outgoing and five incoming).[31] The need for uniformity is highlighted by the prospect of one interpretation of custody rights applied by foreign courts to the cases of children abducted *to* these countries, and a different interpretation applied by courts in the United States governing abductions *from* these countries.

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[31] Compliance Report at 40.

C. Recognition of the *Ne Exeat* Right as a "Right of Custody" under the Convention Furthers the Convention's Goals of Uniformity and Reciprocity

"International law is founded upon mutuality and reciprocity." *Hilton* v. *Guyot*, 159 U.S. 113, 168 (1895). Reciprocity is embodied in the Convention's day-to-day workings, as the Convention relies on contracting states to share information about missing children and about their own custody laws through their Central Authorities, and to develop a uniform body of international law applying the Convention through their courts.

Multilateral treaties that are dependent on contracting states to interact and engage reciprocally are more effective when those states agree on the treaties' interpretation and definitions. Congress has explicitly recognized "the need for uniform international interpretation of the Convention,"[32] and courts have been mindful of this requirement. See, *e.g.*, *Mozes* v. *Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001); *Carrascosa*, 520 F.3d at 259; *Gitter* v. *Gitter*, 396 F.3d 124, 131 (2d Cir. 2005). Foreign courts also have emphasized the significance of uniformity in the application of the Convention. See, *e.g.*, *Hunter* v. *Murrow*, [2005] EWCA Civ 976 at ¶ 47 (Eng. C.A.) (observing that, with regard to the meaning of "rights of custody," "the Hague Convention cannot be construed differently in different jurisdictions: it must have the same meaning and effect under the laws of all Contracting States").

No supranational body oversees the application of the Convention. The contracting states themselves

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[32] 42 U.S.C. § 11601(b)(3)(B).

are responsible for ensuring that the Convention is interpreted consistently in all states, so that all left-behind parents have access to a uniform civil remedy to seek the return of their internationally abducted children. This imposes a responsibility on courts to interpret the Convention with reference to decisions in other states. In this case, uniformity would be promoted by recognizing that the holder of a *ne exeat* right is entitled to return of the child wrongfully removed in violation of that right.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated and the case remanded for further proceedings consistent with the position set forth in this brief.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
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(14)

No. 08-645

In The
Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,
Petitioner,

v.

JACQUELYN VAYE ABBOTT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BOTH 5213D8

QUESTION PRESENTED

The Permanent Bureau will address the following question:

Whether a *ne exeat* provision may give rise to "rights of custody" within the meaning of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

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INTEREST OF THE AMICUS CURIAE[1]

The Hague Conference on Private International Law[2] is a global, intergovernmental organisation, whose mission as set forth in its Statute, an international treaty, is "to work for the progressive unification of the rules of private international law".[3] The principal method used to achieve this end consists of the negotiation and drafting of multilateral treaties or Conventions in the different fields of private international law. One of these Conventions is the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*[4] which entered into force on 1 December 1983 and to which

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amicus* certifies that this brief was not authored in whole or in part by counsel for any other party, and that no person or entity other than the *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

[2] Hereinafter also referred to as "the Hague Conference."

[3] Statute of the Hague Conference on Private International Law (15 July 1955), Article 1, T.I.A.S. No. 5710, 2997 U.N.T.S. 123, text available at: http://www.hcch.net. The Statute was adopted during the Seventh Session of the Hague Conference on Private International Law on 31 October 1951 and entered into force on 15 July 1955. Amendments were adopted during the Twentieth Session on 30 June 2005 (Final Act, C), approved by Members on 30 September 2006 and entered into force on 1 January 2007.

[4] Hereinafter referred to as "the Child Abduction Convention", or "the Convention." T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10,493 (1986).

there are currently 81 States Parties.[5] The Convention entered into force for the United States of America on 1 July 1988.

The Hague Conference, whose origins go back to 1893, became a permanent intergovernmental organisation following the entry into force of its Statute on 15 July 1955. The organisation currently consists of 69 members, 68 Member States (including the United States of America) and one Regional Economic Integration Organisation.[6] The United States of America accepted the Statute of the Hague Conference on 1 October 1964. In addition to the Child Abduction Convention, the United States is a Party to four more multilateral Conventions developed by the Hague Conference[7], and has signed another four Hague Conventions[8].

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[5] This includes 22 States that are not Members of the Hague Conference. *See,* Hague Abduction Convention Country List, text available at: http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html.

[6] The European Community.

[7] The *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*; the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*; the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*; and the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*. *Available at* http://www.hcch.net/index_en.php? act=conventions.listing.

[8] The *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*; the *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of*

The Permanent Bureau is the secretariat of the Hague Conference and has, among other tasks, the role of monitoring and reviewing the operation of the Conventions of the Hague Conference, including the Child Abduction Convention. In the course of this activity, the Permanent Bureau maintains and develops contacts with the National and Contact Organs, experts and delegates of Members, and the Central Authorities designated by the States Parties to the Convention. It organises regular meetings of a Special Commission to review and monitor the practical operation of the Convention where the current practices, challenges and future action required under the Convention are discussed.

The Permanent Bureau also administers the International Hague Network of Judges, currently comprised of 43 judges from 30 States, which provides a basis for the general exchange of information among judges concerning international child protection and for direct judicial communications in the context of specific cases under the Convention.

In addition, the Permanent Bureau is responsible for a number of publications that assist both the monitoring of the Convention and the formulation of good practices under it. One of the more important of these publications is the International Child Abduction

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Securities held with an Intermediary; the *Hague Convention of 30 June 2005 on Choice of Court Agreements*; and the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*. *Available at* http://www.hcch.net/index_en.php?act=conventions.listing.

Database (INCADAT)[9] which contains summaries of decisions given in child abduction cases from States around the world. The purpose of this database is to provide access to decisions concerning the Convention taken by national courts of States Parties around the world (as there is no single international [or supranational] court of last resort) and make them available to judges, Central Authorities, governments, lawyers, researchers and other persons with an interest in, or affected by, international child abduction. The database currently contains more than 800 summaries and is available in English, French and Spanish.

Other publications produced by the Permanent Bureau include the *Judges' Newsletter on International Child Protection* and various Guides to Good Practice under the Convention. The *Judges' Newsletter* is a journal that is written by and for judges and contains articles concerning the interpretation of the Hague Children's Conventions in the various States around the world.[10] The Good Practice Guides, so far available in relation to Central Authority Practice, Implementation of the Convention, Preventive Measures and Transfrontier Contact, gather together examples of good practice under the Convention from the Contracting States and provide suggestions for

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[9] *Available at* www.incadat.com.

[10] The *Judges' Newsletter* can be found on the website of the Hague Conference under "Child Abduction Section" then "The Judges' Newsletter on International Child Protection." *Available at* http://www.hcch.net.

how the operation of the Convention can be improved.[11]

In this context, the Permanent Bureau is especially sensitive to and concerned about promoting consistent interpretation of the Convention. While the Permanent Bureau has limited resources it considers that, in certain exceptional cases where the integrity of the application of the Convention appears to be in danger, it is appropriate for the Permanent Bureau as part of its role in monitoring and guiding the operation of the Convention to submit its opinion on the legal issues involved in a case pending before a court. This is a natural extension of the activities mentioned above.

STATEMENT

The Permanent Bureau respectfully submits this *amicus curiae* brief. It is argued that the court of appeals erred in its interpretation and application of the Convention, and in particular should have found that a *ne exeat* provision did, in the circumstances, give rise to "rights of custody" within the meaning of the Convention.

A *ne exeat* provision in this context forbids the removal of a child from the jurisdiction by the custodial parent (or primary caregiver) without the consent of the other parent or the court. When an international removal occurs in breach of such a provision, the left-behind parent often relies on the

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[11] These Guides can be found on the website of the Hague Conference under "Child Abduction Section" then "Guide to Good Practice." *Available at* http://www.hcch.net.

Convention and in particular the return remedy under Article 12. Generally, the Convention is the only legal remedy available to the left-behind parent, because it provides both the normative context and the machinery for international cooperation indispensable to resolve cross-border wrongful removal issues.

In order for the Convention to apply the removal must be in breach of custody rights attributed by the law of the State in which the child was habitually resident immediately before his or her removal. It is for the court in the requested State to determine whether the rights attributed under the law of the State of the child's habitual residence do or do not constitute "rights of custody" within their autonomous Convention meaning.

Article 5 provides that for the purposes of the Convention "rights of custody" include rights relating to the care of the person of the child and, in particular, the right to determine the child's residence. According to Article 3, custody rights may be attributed to a person, an institution or any other body. The article states that these rights may arise in particular by operation of law or by reason of a judicial or administrative decision or by reason of an agreement having legal effect.

In the case before the Court, the question is whether the *ne exeat* provision in Chilean statutory law and in the Chilean court order comes within the meaning of "rights of custody" under the Convention.

This brief has three purposes. The first is to explain why it is important and in the interests of children and their families that courts should, when interpreting

the Convention, place a high value on consistency. Both between Contracting States and within Contracting States significant divergences in the interpretation of Convention concepts tend to undermine the mutual confidence between States Parties upon which the successful operation of the Convention depends. It may also dilute the clear message to parents which has been a characteristic feature of the Convention and which has dissuaded many parents from engaging in the unilateral relocation of children.

The second purpose is to confirm and support the Petitioner's statements concerning the context in which the relevant language of the Convention is used[12] and to indicate the broad consensus that has developed among Contracting States in relation to the matter in issue. This broad consensus – that *ne exeat* provisions are constitutive of "rights of custody" under the Convention – is evidenced both by case law and by formal discussions that have taken place among representatives of States Parties.

The third purpose is to indicate reasons why a broad approach to the definition of "rights of custody" helps to achieve the objectives of the Convention.

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[12] Part III A, at p. 25 of the Petition.

ARGUMENT

I. THE IMPORTANCE OF CONSISTENCY FOR THE OPERATION OF THE CONVENTION

The case for consistency in interpretation of the Convention falls into two parts. First there are concerns that lack of consistency is damaging to the specific purposes served by the Convention. Second, there are more general arguments which arise from the nature of this and other similar conventions and the international law context in which they operate.

A principal object of the Convention is to protect children from the harmful effects of their wrongful removal or retention across international boundaries. The Convention fulfils this objective not only by providing a remedy (the return order) for cases where wrongful removal or retention has occurred, but also by creating a firm legal structure which makes it less likely that such cases will occur. One of the great strengths of the Convention is that it gives a clear message to a parent who is considering removing a child to another jurisdiction about what is the right way to proceed, and what is the wrong way. A divergence in the interpretation of the Convention, particularly in the interpretation of a fundamental concept such as "rights of custody," results in a blurring of this message.

This blurring of the message can lead to two undesirable consequences. It may increase the attractiveness of certain jurisdictions as places to which a child is abducted. If a parent is aware that if he or she brings the child to a particular location and

the application of the Convention there will not result in the return of the child, the parent may be more inclined to choose that location.

One of the major problems that the drafters of the Convention wished to prevent is that of a parent actively forum shopping by removing a child from one jurisdiction to another. In order to ensure that this aim is still achieved, it is necessary, as much as is reasonably possible, to ensure that the response given by the courts in all States Parties to an individual abduction will be the same.

Another undesirable consequence is the effect that uncertainty can have on the swift resolution of applications under the Convention. A key component to the satisfactory operation of the Convention is the use of expeditious procedures and the speedy resolution of cases.[13] When there is a division in approach to the interpretation of the Convention, such division provides technical legal arguments to the parties involved that they can pursue to a higher appeal level. This prolongs the proceedings and slows down the resolution of the case.

With regard to the more general arguments for consistency, it should be recalled that there is no supranational body to provide a final and binding interpretation of the autonomous terms of the Convention. Instead responsibility rests with the

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[13] *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures*, Jordan Publishing, 2003, p. 11.

individual courts and judges in each Contracting State to help bring about a consistent approach to the interpretation of key concepts. It is therefore important that national courts take into account the approach that other States' courts are taking with regard to the interpretation of Convention concepts, and there is much evidence that this is increasingly the case.[14] The same is true of many other modern international conventions under which the courts in the different Contracting States exercise what amounts to a joint responsibility.

Where serious divergences in interpretation do occur as between Contracting States, this can affect the mutuality which is at the heart of treaty relations generally and, in particular, of the Convention, which is an international instrument for judicial and administrative co-operation based on reciprocity. Under the Convention, if it becomes clear that one Contracting State is not prepared to make the return

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[14] *See e.g. Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) (INCADAT Cite: HC/E/USf 301) where the court referred to cases in Australia, Canada, Sweden and the United Kingdom, as well as the United States of America. In other jurisdictions, the Australian High Court referred to cases from Canada, Ireland, New Zealand, the United Kingdom and the United States of America in *DP v. Commonwealth Central Authority; JLM v. Director-General NSW Department of Community Services* [2001] HCA 39 (INCADAT Cite: HC/E/AU 347), while the Supreme Court of South Africa referred to cases from Australia, Canada, Germany, the United Kingdom and the United States of America in *Sonderup v. Tondelli* 2001 (1) SA 1171 (INCADAT Cite: HC/E/ZA 309). Note also that the freely accessible electronic International Abduction Database (INCADAT) was established to facilitate judges in their consideration of the case law of other Contracting States, cf. footnote 5 *supra* and accompanying text.

order available in circumstances where other Contracting States will do so, reciprocity is breached and the mutual trust and confidence on which successful Convention relations depend is affected.

Finally, it should be recalled that States Parties to the Convention do not have a single legislative means of curing problems of divergent interpretation. Any amendment of the Convention will require international negotiations among all the Contracting States involving a long, complex and expensive procedure, followed by an effort to ensure that all Contracting States accept the changes by ratifying the international instrument amending the Convention.

It is respectfully submitted that the Court has an important opportunity to confirm the value and importance among the community of 81 States Parties to the Convention of seeking to achieve convergence in its interpretation.

II. SUBSEQUENT PRACTICE AND AGREEMENT ON THE INTERPRETATION OF THE CONVENTION

The question at issue in this case is one of the interpretation of an international treaty. In this respect the Permanent Bureau expresses support for the Petitioner's statement concerning the interpretation and in particular the context in which the words of the Convention are used.[15]

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[15] Part III A, at p. 25 of the Petition.

The Permanent Bureau would also emphasize that a broad positive consensus has developed among Contracting State on the question of whether a *ne exeat* provision may give rise to a "right of custody" under the Convention. This consensus is evidenced by the international case-law, as well as by formal discussions among, and recommendations made by, representatives of the States Parties in the meetings of Special Commissions convened by the Hague Conference to review the practical operation of the Convention and to which all States Parties are invited.[16]

States Parties have made it clear that they would wish the Convention to be interpreted uniformly and having regard to its autonomous nature, and not in a manner limited to the interpretation applied to phrases in purely domestic cases.[17] Thus the expression "rights of custody", for example, does not

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[16] Subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation may, according to customary international law, be taken into account in interpreting the treaty, see Art. 31(3) *a)* of the Vienna Convention on the Law of Treaties which, according to *Libya v. Chad* ICJ Reports (1994), p.4, at para. 4.1, reflects customary international law.

[17] See, for example, Conclusions and Recommendations of the Fourth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22–28 March 2001), drawn up by the Permanent Bureau (hereinafter, "Conclusions and Recommendations of the Fourth Meeting of the Special Commission"), see para. 4.1. *See* Hague Conference website under "Child Abduction Section" then "Special Commission meetings" and "Preliminary Documents," *available at* http://www.hcch.net.

coincide with any particular concept of custody in a domestic law, but draws its meaning from the definitions, structure and purposes of the Convention. While national concepts and national law rules will undoubtedly influence judges' understanding of the issues at hand, they cannot be seen as decisive in determining the meaning of terms such as "rights of custody" or "rights of access" under the Convention.

III. EXAMINATION OF CASE LAW

The case law shows that courts in a great majority of the Contracting States that have addressed the issue have accepted that a *ne exeat* provision may give rise to a right of custody for Convention purposes. The brief submitted by the Petitioner discusses many of these cases in detail and it is not proposed to repeat that analysis here. Instead, attention will be drawn to a few additional cases, not mentioned there, that are also worth noting.

While reference was made in the Petitioner's brief to the case in the United Kingdom of *C v. C (Abduction: Rights of Custody)*,[18] it should be emphasized that this is not an isolated case, but has been followed by a robust line of cases,[19] most recently

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[18] [1989] 1 WLR 654 (INCADAT Cite: HC/E/UKe 34).

[19] Also including in England *C v. C (Minors)(Child Abduction)* [1992] 1 FLR 163 (INCADAT Cite: HC/E/UKe) and in Scotland *McKiver v. McKiver* 1995 SLT 790 (INCADAT Cite: HC/E/UKs 189).

the House of Lords decision of *Re D.*[20] While this case centred on the interpretation of Article 15 of the Convention, it also included a detailed discussion of the interpretation of *ne exeat* provisions, or the right to veto a removal from the jurisdiction. Baroness Hale of Richmond, whose view was accepted by the majority of the court, emphasized the importance of consistent practice. Although she acknowledged the force of the arguments against including a person holding a right of veto in the category of persons with rights of custody, she found that it would, at the very least, be an odd result if a Convention designed to secure the summary return of children wrongfully removed from their home countries were not to result in the return of children whose removal had clearly been in breach of the laws, court orders or enforceable agreements in the home country. She was also very careful to indicate that there still remained a clear separation between "rights of custody" and "rights of access" and that the parent had to have more than a right to go to court and ask for an order to prevent, for example, relocation.

Other jurisdictions also have lines of authority accepting the principle that if there is a *ne exeat* provision, and this provision is breached by the abducting parent, this is a wrongful removal within the terms of the Convention. These include Australia,[21]

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[20] [2007] 1 A.C. 619 (INCADAT Cite: HC/E/UKe 880), mentioned at footnote 2. of the Petitioner's brief.

[21] Such as, for example, *State Central Authority and Pankhurst* [2007] FamCA 1345; *Secretary, Attorney-General's Department v. T.S.* [2000] Fam.C.A. 1692 (INCADAT Cite: HC/E/AU 823); *Brooke & Director General Department of Community Services* [2002] FamCA 258.

Austria,[22] New Zealand,[23] Ireland,[24] Canada,[25] South Africa[26] and Switzerland.[27]

IV. EXAMINATION OF SPECIAL COMMISSION PROCEEDINGS

The States Parties to the Convention meet together periodically in a Special Commission organised by the Permanent Bureau at the request of the Members of the Hague Conference, to review, and make recommendations on, the practical operation of the Convention.[28] All States Parties to the Convention, Members or non-Members of the Hague Conference are invited to participate in such meetings. So far five

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[22] Oberster Gerichtshof, 2 Ob 596/91, May 2, 1992 (INCADAT Cite: HC/E/AT 375).

[23] *Gumbrell v. Jones* [2001] N.Z.F.L.R. 593 (INCADAT Cite: HC/E/NZ 446).

[24] *H.I. v. M.G. (Child Abduction: Wrongful Removal)* [2000] 1 I.R. 110 (INCADAT Cite: HC/E/IE 284); *R.C. v. I.S.* [2003] 4 I.R. 431.

[25] *Hewstan v. Hewstan* [2001] BCJ No 590 (BCSC)(QL) (INCADAT Cite: HC/E/CA 753).

[26] *Sonderup v. Tondelli* 2001 (1) SA 1171 (CC), (INCADAT cite: HC/E/ZA 309).

[27] TR 132/1999, *Tribunal civil de l'Arrondissement de la Sarine*, 17 May 1999 (INCADAT Cite: HC/E/CH 442).

[28] The reports of these Special Commission meetings are available on the website of the Hague Conference on Private International Law, under "Child Abduction Section", then "Special Commission meetings on the practical operation of the Convention". *Available at* http://www.hcch.net.

of these meetings have taken place, in 1989, 1993, 1997, 2001, and 2006. A variety of issues relating to the practice under the Convention are discussed at these meetings by State representatives and those involved in the abduction procedures, such as Central Authority officials and judges who hear these cases. One recurring issue is the interpretation of key Convention concepts, including the concept of "rights of custody".

In addition to the First Meeting of the Special Commission in 1989, the report of which is cited in the Petitioner's brief, the issue has also arisen in several further meetings of the Special Commission. The Report of the Second Meeting of the Special Commission in 1993 states:

> Conversely the view expressed by the *Tribunal de Grande Instance de Périgueux* in the case cited in the Checklist, to the effect that an order of the court granting custody which prohibited the custodian from removing the child from the court's jurisdiction without consent of the other parent constituted only a "modality" attached to the right of custody and not a situation of joint custody, gathered no support. This view had been rejected by the *Cour d'appel d'Aix-en Provence*,[29] as well as by courts in Austria,

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[29] *Ministere Public c. MB*, Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, Mar. 23, 1989, *reprinted in* 79 Rev. crit. 529 (1990).

Australia, the United Kingdom and the United States of America.[30]

The issue arose again in 1997 and the Report of the Third Meeting of the Special Commission states:

> There have been a number of cases where the return of the child to a parent with custody rights was denied because that parent had not actually been living with the child for a certain period of time. However, some parents might understand their custody rights as mainly allowing them to object to a future change of residence of the child. Under the aforementioned case law such parents would be precluded from requesting the return of the child at the time they intended to exercise their rights of custody. At the time the Convention was drafted, "rights of custody" under Article 5 were deemed to cover cases where a parent had rights of access and the right to be consulted before a change of the child's place of residence. The requirement of actual exercise of custody rights under Article 3 *b)* of the Convention in effect demands that the parent has maintained some contacts with the child.[31]

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[30] "Report on the Second Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (18-21 January 1993)", drawn up by the Permanent Bureau, pp. 10-11.

[31] "Report on the Third Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (17-21 March 1997)", drawn up by the Permanent Bureau, p. 7.

In 2006, the discussion of the issue arose in the context of the preparation of a *Guide to Good Practice on Transfrontier Contact Concerning Children*.[32] During the discussion the Permanent Bureau noted that a clear preponderance of case law supported the view that the combination of access rights with a veto on the removal of a child constituted a custody right for the purposes of the Convention. The ensuing discussion can be found in the report:

> Some participants emphasized the importance of resolving the conflict in case law regarding this aspect of the definition of custody. Several experts explained that in their States, the meaning of access / contact rights in relation to custody rights was not an issue in itself where parents both exercised their parental authority over the child, where the child was removed without the permission of the left-behind parent and the latter would ask for the return of the child, based on a right of custody arising from his / her parental authority. One expert underscored that concepts such as "parental responsibility" have evolved since the 1980 Convention was adopted and that it was important to keep these changes in mind in the application of the Convention.[33]

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[32] *Guide to Good Practice on Transfrontier Contact Concerning Children*, Jordan Publishing, 2008. Also available on the Hague Conference website <www.hcch.net>, under "Child Abduction Section" and then "Guides to Good Practice".

[33] "Report on the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the

The Special Commission also approved the publication of the *Guide to Good Practice on Transfrontier Contact Concerning Children*, which contains a statement that:

> The preponderance of the case law supports the view that a right of access combined with a veto on the removal of a child from the jurisdiction constitutes a custody right for the purposes of the 1980 Convention.[34]

The guide goes on to explain further that the opposing view does not command widespread support.[35]

V. A BROAD DEFINITION OF CUSTODY RIGHTS HELPS TO ACHIEVE THE OBJECTIVES OF THE CONVENTION

Arguments for a stricter interpretation of rights of custody are that the return order was primarily conceived and drafted as a mechanism to remedy situations in which children are abducted by their non-primary caregiver parent, that the Convention itself

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Practical Implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006)", drawn up by the Permanent Bureau, March 2007, para. 212.

[34] *Guide to Good Practice on Transfrontier Contact Concerning Children*, *supra* note 10, at p. 43.

[35] *Id.*

contains a clear distinction between rights of custody and rights of access and that the Convention provides a separate procedure, found in Article 21, for securing the effective exercise of rights of access. In addition, it can be argued that the use of the return order to support a non-removal clause in a final custody order may have implications for the mobility rights of the primary caretaker.[36]

We would caution against accepting these arguments. Maintaining a broad definition of custody rights helps to achieve the wider objectives of the Convention. The Preamble to the Convention states the desire to "protect children internationally from the harmful effects of their wrongful removal or retention." There are harmful effects for children when they are removed unilaterally from their place of habitual residence, whether by an "access" parent or a primary caregiver. The existence of a *ne exeat* provision has the effect that the child should remain in the same State as the non-primary caregiver parent unless that parent has agreed to the move. This agreement can, and usually will, include arrangements for that parent to continue to have contact with the child following the move. A move in breach of a *ne exeat* provision will often not only place the child at a further physical distance from the non-primary caregiver parent, but take place without making arrangements for how that parent's relationship with the child will continue in the future. Unilateral action by the primary caregiver can result in a sudden uprooting of the child from his

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[36] See, e.g., *Thomson v. Thomson* [1994] 3 SCR 551, 6 RFL (4th) 290 (INCADAT Cite: HC/E/CA 11).

or her environment and a relocation that is surreptitiously and inadequately prepared.

In relation to the argument that a broad interpretation of custody rights leads to a situation where the primary caregiver is forced to remain in a particular State, irrespective of his or her situation and opportunities there, the answer lies in a sensible approach to the issue of relocation of the child and the primary caregiver. The ideal is that this matter should be the subject of agreement between the parents. Where this is not possible, national laws generally provide procedures allowing applications for leave to remove, that is, to relocate. It is important that such a decision be taken by a court of the country of the child's habitual residence. Breach of a *ne exeat* clause by the primary caregiver undermines this principle. In the absence of the protection offered by the Hague Child Abduction Convention, both the child and the left-behind parent will generally remain without any effective legal remedy. In summary, it is in the interests of children to have a global system which clearly signals that parents should not act unilaterally in matters of relocation.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,

Petitioner,

v.

JACQUELYN VAYE ABBOTT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR REUNITE INTERNATIONAL CHILD ABDUCTION CENTRE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

Reunite International Child Abduction Centre ("Reunite") is an English-based independent non-governmental organization with charitable status.[1] Reunite was established in 1986, the year in which the Hague Convention on International Child Abduction became effective in England and Wales following its incorporation into English law by the Child Abduction and Custody Act 1985. Reunite is the leading UK charity specializing in international parental child abduction.

Reunite is committed to raising the profile of international parental child abduction on the international stage. It regularly organizes and attends conferences across the world to promote its work, raises awareness of international parental child abduction, and fosters close working relationships with governmental departments and non-governmental organizations, to better enable quick resolution in cases of child abduction, that focus on the best interests of children. In England Reunite works closely with the central government, in particular with the Ministry of Justice, the Foreign & Commonwealth Office and the Home Office, and provides specialist training for

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented in writing to the filing of this brief.

government departments, lawyers, academics, the police, and others who have a professional interest in international parental child abduction. Reunite also administers at the House of Commons the All Party Parliamentary Group on Child Abduction. Reunite is partly funded by the Ministry of Justice and the Foreign & Commonwealth Office, and also receives funding for specific projects from charities and trusts, as well as raising independent funds.[2]

Reunite is not advancing or seeking to advance a particular case cause or outcome in these proceedings. In submitting this brief, Reunite seeks to offer assistance and information to the Court with particular reference to the current position in English law with regard to the issue before the Court, namely whether a *ne exeat* clause confers a "right of custody" under the Hague Convention on International Child Abduction. *See generally El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999) (In interpreting treaties, the Court may

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[2] Reunite's counsel Henry Setright QC, Marcus Scott-Manderson QC, Dr. Marilyn Freeman, and Jacqueline Renton are members of the English Bar and specialists in the field of international family law. Henry Setright and Marcus Scott-Manderson were respectively Lead and Junior Counsel for the Respondent in the definitive case of *In re D (Abduction: Rights of Custody)*, (2007) 1 A.C. 619 (H.L. 2006), in the UK House of Lords. Dr. Freeman is Reader in Family and Child Law and Co-Director of the Centre for Family Law and Practice at London Metropolitan University, which is dedicated to both academic and practical aspects of Family Law and, in particular, international family law. Jacqueline Renton worked at the International Child Abduction and Contact Unit, the Central Authority for England and Wales, before entering private practice.

consider "'the postratification understanding of the contracting parties'") (citation omitted).

SUMMARY OF ARGUMENT

1. The House of Lords ruling in *In re D (Abduction: Rights of Custody)*, (2007) 1 A.C. 619 (H.L. 2006), was based on a wide purposive interpretation of the policy and language of the Hague Convention 1980 and a consideration of the preceding position of English and Scottish law as balanced against the article 3 jurisprudence of the U.S. and other signatories to the Hague Convention 1980. The Speech of Baroness Hale makes clear[3] that this was a decision made in accordance with what appears to be the majority of the Common Law world at the time and it is a position which continues to this day.

2. The relevant development of European Union and Strasbourg Human Rights jurisprudence (which relates to European states, the majority of which do not maintain a Common Law jurisdiction, but can be described as Civil Law jurisdictions) seems to reinforce what the House of Laws observed to be this Common Law majority approach.

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[3] *In re D*, 1 A.C. at 635, ¶ 37.

ARGUMENT

I. English Law Interprets "Rights of Custody" Under the Hague Convention To Include a *Ne Exeat* Right.

A. The House of Lords' Decision in *In re D*

The position in English[4] jurisprudence on the scope of "rights of custody," pursuant to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, T.I.A.S. No. 11670 (herein referred to as the "Hague Convention 1980"), is expressed in the decision of the House of Lords in the case of *In re D (Abduction: Rights of Custody)*, (2007) 1 A.C. 619 (H.L. 2006).[5] This decision

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[4] There are a number of separate constituent United Kingdom legal jurisdictions – including (a) England and Wales, (b) Scotland, and (c) Northern Ireland – all of which have their own statutory and judge-made domestic law. The House of Lords is the supreme court of appeal for all these jurisdictions. In this Brief references to "England" or "English" in the context of jurisdiction or domestic law should be read as including "Wales" or "Welsh."

[5] The five Law Lords who sat in judgment in *In re D* were unanimous in the decision to allow the appeal. However, *In re D* did not just determine the scope of "rights of custody," pursuant to article 3 of the Hague Convention 1980 and only the speeches of Lord Hope of Craighead and Baroness Hale of Richmond address the article 3 question. A third Law Lord, Lord Brown of Eaton-Under-Heywood, states he is in respectful agreement with the opinions of Baroness Hale of Richmond and Lord Hope of Craighead "on all issues," 1 A.C. at 648, ¶ 84, and a fourth Law Lord, Lord Nicholls of Birkenhead, states he is in agreement with Baroness Hale of Richmond (albeit without the specificity as to "all issues"). *Id* at 624, ¶ 1. The fifth Law Lord, Lord Carswell, accepted the cogency of the "rights of (continued...)

establishes that a *ne exeat* right in English domestic law amounts to a "right of custody" within the meaning of article 3 of the Hague Convention 1980. This right is expressed by Baroness Hale as a "right of veto": "[I]n common with the understanding of the English and Scottish courts hitherto, and with what appears to be the majority of the common law world, I would hold that a right of veto does amount to 'rights of custody' within the meaning of article 5(a)." *Id.* at 635, ¶ 37.

The Hague Convention 1980 clearly differentiates between "rights of custody" and "rights of access." Article 5 of the Hague Convention 1980 acts as a definitional aid to article 3 of the Hague Convention 1980.

In her discussion of the difference between "rights of custody" and "rights of access" in *In re D*, Baroness Hale refers to the Explanatory Report of Professor Elisa Pérez-Vera (April 1981):

> It is quite clear from the Explanatory Report of Professor Elisa Pérez-Vera (April 1981) that the original parties to the Convention drew a deliberate distinction between rights of custody and rights of access and did not intend that mere rights of access should entitle a parent to demand the summary

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custody" arguments posited in the speeches of Baroness Hale of Richmond and Lord Hope of Craighead but reserved his position on the issue; he did not disagree with the views of Baroness Hale of Richmond and Lord Hope of Craighead. *Id* at 646, ¶ 74.

> return of the child. As Professor Pérez-Vera pointed out, such an approach would ultimately lead to "the substitution of the holders of one type of right by those who held the other."

1 A.C. at 631, ¶ 25 (quoting Professor Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ¶ 65 (April 1981)).

The Respondent in *In re D* submitted that the aims of the Hague Convention are directed at preventing the harmful effects of international child abduction: the contention was made that the Hague Convention is a living instrument. It was further contended that the Convention relied for its effectiveness on a broad, purposive and robust interpretation.[6] Reference was made[7] to the case of *In re D (Abduction: Custody Rights)*, (1999) 2 F.L.R. 626, where Stephen Brown, the President of the Family Division, was confronted with the position that the law of Zimbabwe, being the law of the state of habitual residence, gave all custody rights to the mother on parental separation. It was argued that this meant that the removal of the child by the mother was not wrongful in Hague Convention terms. The President's decision was to the effect that an overly technical or restrictive interpretation of the domestic law of the State of the habitual

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[6] As summarized in the note of submissions before the House in the Law Report.

[7] In the written case for the Respondents as lodged with the House prior to the oral hearing.

residence would effectively negate the working of the Hague Convention. *Id.* at 629-30. He cited with approval the words of Waite LJ:

> The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression 'rights of custody' when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases, that will involve giving the term the widest sense possible.

Id. (citing *In re B (A Minor) (Abduction)*, (1994) 2 F.L.R. 249, 260).

In his consideration of the language of article 5, Lord Hope of Craighead states that the phrase "child's place of residence" must be seen in the context of the Hague Convention 1980 being an international Convention designed to regulate cross-border movement of children. *In re D*, 1 A.C. at 626, ¶ 10. Accordingly, the word "place" should include

the country of the child's residence, as well as the location within a country and thus a *ne exeat* right can amount to a "right of custody."[8]

Baroness Hale makes clear in *In re D* that the quality of a parent's relationship with a child should not be a consideration for a court when seized of a Hague Convention 1980 application (save where issues of welfare are considered within the framework of the Convention.) 1 A.C. at 634-35, ¶ 36. The quality of the relationship is only to be assessed (if necessary) upon the requesting state having determined the Hague Convention 1980 application. Further, Baroness Hale observes:

> It would, at the very least, be an odd result if a Hague Convention designed to secure the summary return of children wrongfully removed from their home countries were not to result in the

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[8] The Petitioner unsuccessfully argued that a "right of custody" required a positive right to choose a child's place of residence, not a negative right to prevent a move as in most cases the abductor was the child's primary caregiver and therefore, given the need of the child for a secure home with a competent and caring parent, the court ought not too readily order a summary return because the other parent has a right a veto. *See TB v. JB (Abduction: Grave Risk of Harm)*, (2001) 2 F.L.R. 515, 526-27, ¶¶ 43-44 (C.A.) (Eng.). Further, Baroness Hale, by virtue of accepting that a *ne exeat* right amounts to a "right of custody," also rejected the Petitioner's contention as article 5 stipulates: "rights of custody '*shall include*' the right to determine the child's place of residence" it is not enough for a parent to simply have a *ne exeat* right. *In re D*, 1 A.C. at 633-35, ¶¶ 32-37 (emphasis added).

> return of children whose removal had clearly been in breach of the laws, court orders or enforceable agreements in the home country.

Id.

It is important to note that Baroness Hale places a limitation on the scope of the "right of veto" by stipulating that a "potential right of veto" could not amount to a "right of custody" because "to hold otherwise would be to remove the distinction between 'rights of custody' and 'rights of access' altogether." *Id.* at 635, ¶ 38.

B. Past English and Scottish Jurisprudence

In *In re D*, the House of Lords surveyed past English and Scottish article 3 jurisprudence. Baroness Hale makes clear that since the case of *C v. C (Abduction: Rights of Custody)*, (1989) 1 W.L.R. 654 (Eng. C.A.), the English courts have held that a *ne exeat* right amounts to a "right of custody." *In re D*, at 633, ¶ 31.

C v. C was followed in *In re W (Minors) (Abduction: Father's Rights)*, [1999] Fam. 1; *In re B (A Minor) (Abduction: Father's Rights)*, (1998) 3 W.L.R. 1372. In *In re W*, Mrs. Justice Hale (as she then was) made clear that the court's interpretation of "rights of custody" was an interpretation commonly held by other signatories to the Hague Convention 1980. Further, Lord Justice Wall made clear in *In re P (Abduction Consent)*, [2004] EWCA Civ 971, that *C v. C* and subsequent decisions in England to the same effect were correct. In *J*,

Petitioner, [2005] CSIH 36, 2005 GWD 15-251 (Scot.), the Inner House of the Court of Session in Scotland held that a *ne exeat* right amounts to a "right of custody," the court having applied *C v. C* and *In re B*.

C. The Article 3 Jurisprudence of the United States and Other Countries

In *In re D*, Lord Hope of Craighead notes the academic opinion of Professor Silberman, who is highly critical of the approach that the courts in the United States have considered the scope of "rights of custody":

> As I have indicated, it is important to separate [Hague] Convention concepts from domestic analogues found in particular judicial systems. The term "rights of custody" is an important concept within the meaning of the Convention and rests on an autonomous definition that triggers the return remedy. Contracting States have agreed to those situations in which they will order return – i.e. a breach of "rights of custody" – and domestic definitions of custody rights are not necessarily the equivalent of the concept created by article 5 (a).
>
> Recent decisions by courts in the United States have been the most blatant offenders of this important principle by imposing parochial domestic notions of custody on the Convention concept,

> effectively undermining the goals and objectives of the Convention.

In re D, at 628, ¶ 15 (citing Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U. C. Davis L. Rev. 1049, 1069 (2005)).

The starting point of the House of Lords in its consideration of the article 3 jurisprudence of the United States was the decision in the case of *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000). The House of Lords stated that the majority in *Croll* based its determination on:

> the deliberate distinction drawn in the Convention between rights of custody and rights of access, the lack of international consensus on the issue, and the published views of Professor A.E. Anton, chair of the [Hague] Conference Commission which had drafted the Hague Convention (1981) 30 ICLQ 573, 546.

In re D (Baroness Hale), 1 A.C. at 633-34, ¶ 33.[9]

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[9] Professor A.E. Anton was the chair of the Hague Conference Commission which drafted the Hague Convention. Writing in 1981 he appears to have suggested that a *ne exeat* right might not be the basis of an abduction – this suggestion having been raised by a Canadian delegate at the final diplomatic conference on the Hague Convention in October 1980 and not pursued by the conference.

In *In re D*, Baroness Hale comments at 634, ¶ 34 that the international case law used by the majority in *Croll* to support their interpretation of "rights of custody" was two Supreme Court of Canada decisions – namely, *Thomson v. Thomson* [1994] 3 S.C.R. 551 (Can.), and *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108 (Can.). *In re D*, 1 A.C. at 634, ¶ 34. In *Thomson*, the court drew a distinction between a *ne exeat* clause in an interim custody order and a final custody order; the former said to invest a court with rights of custody (the *ne exeat* clause having been placed in the interim custody order so as to preserve the court's jurisdiction until there is a final custody determination) but the latter said to not invest a parent with rights of custody (the *ne exeat* clause having usually been inserted into a final custody order so as to ensure permanent access to the non-custodial parent and thus granting the parent a "right of access" not a "right of custody"). *Thomson* is followed by *D.S.* However, both cases' commentary on *ne exeat* clauses were only *obiter dictum* observations.

The court also noted that the majority's decision in *Croll* was followed in the cases of *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), and *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003), but in the latter case of *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), the court unanimously rejected the reasoning of the majority in *Croll* and supported the dissent of then-Judge Sotomayor on the basis that the court's construction of the *ne exeat* right thwarts the purpose of the Hague Convention 1980. *Furnes* makes clear that welfare considerations were not altered by virtue of

accepting that a *ne exeat* clause amounts to a right of custody but simply ensured that the pre-abduction, jurisdiction status quo would be maintained—namely, a preservation of the requesting state's welfare jurisdiction—if a summary return of a child was ordered by the court in the requested state, pursuant to article 12 of the Hague Convention 1980. The last U.S. case referred to is *Bader v. Kramer*, 445 F.3d 346 (4th Cir. 2006), which cites *Gonzalez* and *Fawcett* (which followed *Croll*) without disapproval.

In *In re D*, Baroness Hale made clear that apart from the aforementioned Canadian cases, known opinion in the common law world was united in an acceptance that a *ne exeat* right is a "right of custody" within the meaning of article 3 of the Hague Convention 1980. 1 A.C. at 634, ¶ 35. The following case law was used to exemplify this point:

- The Constitutional Court of South Africa in *Sonderup v. Tondelli*, 2001 (1) SA 1171 (CC) (S. Afr.), had approved the dissenting opinion of then-Judge Sotomayor in *Croll*, reasoning that the majority in *Croll* did not accord with the majority of international jurisprudence;

- The full court of the Family Court of Australia in *J.R. v. M.R.*, (unreported) (22 May 1991) (Fam. Ct.) (Austl.), had followed the English decision of *C v. C*, as had Judge Lindemayer at first instance in *Director General, Department of Families, Youth and Community Care v. Hobbs* (1999) FamCA 2059 (Austl.);

- The Israeli High Court in A 5271/92 *Foxman v. Foxman* [1992] IsrSC (unreported) (Isr.), held that rights of custody should include a *ne exeat* right;

- The Court of Appeal in New Zealand in *Gross v. Boda*, [1995] N.Z.F.L.R. 49 (C.A.) (N.Z.), and *Dellabarca v. Christie*, [1999] N.Z.F.L.R. 97 (C.A.) (N.Z.), had gone further than the other states by declaring that a "right of access" can amount to a "right of custody."

It is important to note that while the House of Lords in its judgment in *In re D* explicitly balanced the jurisprudence of the United States against five other countries' "rights of custody" jurisprudence, the Law Lords also had before them documentary material which included all the article 3 case law found on the INCADAT website[10] and responses from

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[10] At the time of *In re D*, the INCADAT (International Child Abduction Database) revealed the following case law in respect of "rights of custody": *A.J. v. F.J.*, [2005] CSIH 36 (Scot.); *Ministere Public c. M. B*, Courd'appel [CA] [regional court of appeal] Aix-en-Provence, Mar. 23, 1989, *reprinted in* 79 Rev. crit. 529 (1990)); *Gross v. Boda*, [1995] N.Z.F.L.R. 49 (N. Z.); *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108 (Can.); *Thorne v. Dryden-Hall*, [1997] 28 R.F.L. (4th) 297 (Can.); *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (Can.); *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003); *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002); Oberlandesgericht Celle [OLG] [Court of Appeal] Aug. 17, 1999, 18 UF 34/99 (F. R. Ger.); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999); *W.P.P v. S.R.W*, [2001] I.L.R.M. 371 (Ir.); *Hunter v. Murrow*, [2005] E.W.C.A. (Civ) 976 (Eng. & Wales); *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004); *In re V-B (Abduction: Custody Rights)*, [1999] 2 F.L.R. 192 (Eng. & Wales); *Dellabarca v. Christie*, [1999] (continued...)

the Central Authorities in countries that are signatories to the Hague Convention 1980 who had been asked by the Respondent to consider, *inter alia*, the meaning of "rights of custody" within their jurisdiction.[11]

Baroness Hale also recognized in *In re D* the potential importance of developments in the jurisprudence of the European Union through Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II Revised Regulation) (herein referred to as "Brussels II Revised") and Strasbourg Human Rights jurisprudence – through the European Convention on Human Rights 1950: *see* 1 A.C. at 642-44, ¶¶ 61, 63-65.

II. The English Interpretation of Article 3 of the Hague Convention In the Context of Other International Obligations.

A. Article 3 and the Brussels II Revised Regulation

The Brussels II Revised Regulation is a European Union regulation incorporated into the law

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N.Z.F.L.R. 97 (N. Z.); Oberlandesgericht Koln[OLG] [Court of Appeal] Apr. 12, 2001, 21 UF 70/01 (F.R. Ger.).

[11] The following Central Authorities were approached: Ireland, Germany, Denmark, !taly, New Zealand, Hong Kong, Isle of Man, Portugal, Scotland, Sweden, Canada (Province of Manitoba), Finland, Lithuania, Bosnia, Falkland Islands, Holland, South Africa, Iceland.

of all European Union member states except Denmark. Article 2 (11) of the Brussels II Revised Regulation states:

> the term 'wrongful removal or retention' shall mean a child's removal or retention where:
>
> (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and
>
> (b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

Brussels II Revised Regulation (EC) No. 2201/2003, Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000, art. 2 (11), 2003 O.J. (L 338) 1.

The Practice Guide for the Application of the New Brussels II Regulation, which is advisory and not binding,[12] comments in Part VII (The Rules on Child Abduction), Section 2.1 that:

> The judge shall first determine whether a "wrongful removal or retention" has taken place in the sense of the Regulation. The definition in Article 2 (11) is very similar to the definition of the 1980 Hague Convention (Article 3) and covers a removal or retention of a child in breach of custody rights under the law of the Member State where the child was habitually resident before the abduction. However, the Regulation adds that custody is to be considered to be exercised jointly when one of the holders of parental responsibility cannot decide on the child's place of residence without the consent of the other holder of parental responsibility. As a result, a removal of a child from one Member State to another without the consent of the relevant person constitutes child abduction under the Regulation. If the removal is lawful under national law, Article 9 of the Regulation may apply.

Practice Guide for the Application of the New Brussels II Regulation, pt. VII, ¶ 2.1 (Jun. 1, 2005).

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[12] The Practice Guide was drawn up by the European Union Commission services in consultation with the European Judicial Network in civil and commercial matters.

The interrelationship of the Brussels II Revised Regulation with the Hague Convention is governed by article 60 of the Regulation: "In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation."

Article 60 then sets out five Conventions over which the Brussels II Revised Regulation shall take precedence, one of those Conventions being the Hague Convention 1980.

A reading of Recitals 17 and 18 and articles 11 and 12 of the Brussels II Revised Regulation reveals that the Brussels II Revised Regulation is intended to be a supplement to, not replacement for the Hague Convention 1980. Indeed, the Practice Guide comments in Part VII (The Rules on Child Abduction), preamble 1 state that:

> The Hague Convention . . . which has been ratified by all Member States, will continue to apply in the relations between Member States. However the 1980 Hague Convention is supplemented by certain provisions of the Regulation, which come into play in cases of child abduction between Member States. The rules of the Regulation prevail over the rules of the Convention in relations between Member States in matters covered by the Regulation.

The objectives of the Hague Convention 1980 and the Brussels II Revised Regulation in matters of international child abduction appear to be the same.

The Brussels II Revised Regulation's definition of "rights of custody," as defined by article 2 (11) of the Brussels II Revised Regulation 2003 appears to concur with the definition of "rights of custody" provided by the House of Lords in *In re D.* However, it is important to note that the House of Lords in that decision did not contemplate whether or not article 2 (11) explicitly posits that a *ne exeat* clause is a "right of custody" as such deliberation was superfluous given that at the time Romania was not a Member State of the European Union. Further, this issue has not been explicitly considered by an English court since *In re D.*

B. Article 3 and European Human Rights Jurisprudence

There has been an increasing body of case law from the Strasbourg-based European Court of Human Rights in which stress is placed upon the positive obligations on States that are signatories to the European Convention on Human Rights 1950, in both international child abduction and trans-frontier contact/access cases, as a result of article 8 of the European Convention on Human Rights 1950 (the right to respect for a private and family life).

The Strasbourg Human Rights jurisprudence impacts on Hague Convention 1980 decisions in English law in two ways: firstly, directly *via* the

Human Rights Act 1998[13] and secondly, in any application of Brussels II Revised Regulation principles due to the growing acknowledgment in European Union jurisprudence (and vice versa) of Strasbourg Human Rights jurisprudence.

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[13] Section 3(1) of the Human Rights Act 1998 states that primary and subordinate United Kingdom (England, Wales, Scotland and Northern Ireland legislation), so far as it is possible, should be read and given effect in a way which is compatible with the European Convention on Human Rights 1950. However, section 4(2) of the Human Rights Act 1998 states that a court, if satisfied that a provision is incompatible with a Convention right, may make a declaration of incompatibility.

An article 20 "human rights defence" is yet to be successfully presented by a Defendant in an English court. Article 20 is not incorporated into the Child Abduction and Custody Act 1985 (the English statute which incorporates the Hague Convention 1980 into domestic English law) but in *In re D*, Baroness Hale made clear that:

> The Human Rights Act 1998 has now given the rights set out in the European convention legal effect in this country. By virtue of section 6 of the 1998 Act, it is unlawful for the court is bound to give effect to the Convention rights in Hague Convention cases just Act, it is unlawful for the court, as a public authority, to act in a way which is incompatible with a person's Convention rights. In this way, the court is bound to give effect to the Convention rights in Hague Convention cases just as in any other. Article 20 has been given domestic effect by a different route.

In re D, 1 A.C. at 643, ¶ 65.

Article 8 of the European Convention on Human Rights 1950 places on Member States a positive obligation to have measures and legal safeguards to support the right to a family life. *See, e.g., Marckx v. Belgium*, 2 Eur. H.R. Rep. 330 (1979-1980); *Neulinger & Shuruk v. Switzerland*, App. No. 41615/07, Eur. Ct. H.R. (Jan. 8, 2009).

By accepting that a *ne exeat* right amounts to a "right of custody," it could be argued that a State's ability to protect and safeguard family life, pursuant to article 8 of the European Convention on Human Rights 1950 is strengthened.

CONCLUSION

Reunite submits this brief to offer information and assistance to the Court. It takes no position on the proper disposition of this case.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,

Petitioner,

v.

JACQUELYN VAYE ABBOTT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* THE S&W INTERNATIONAL CHILDFIND PROGRAM, THE MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, JUSTICE FOR CHILDREN, PATHWAYS FOR CHILDREN, CHILDREN'S LAW CENTER OF LOS ANGELES, AND EMERGE, IN SUPPORT OF REVERSAL

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INTERESTS OF THE *AMICI CURIAE*[1]

The S&W International ChildFind Program of Sullivan & Worcester LLP in Boston, MA, New York, NY, and Washington, DC provides legal assistance to parents of limited financial means, whose children have been abducted across sovereign borders. Through this program, with the help of Sullivan & Worcester LLP attorneys, left-behind parents can pursue remedies under international law, including the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"). The S&W International ChildFind Program and the lawyers at Sullivan & Worcester LLP who have volunteered for the program have helped reunite numerous abducted children with left-behind parents from a variety of foreign countries. Lawyers affiliated with the S&W International ChildFind Program have advised dozens of parents and children involved in international child abductions, appeared in a majority of the Hague Convention appeals to the First Circuit, and participated in many evidentiary

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[1] Counsel for all parties received notice at least ten days prior to the due date of the *Amici Curiae*'s intention to file this brief, which is submitted with the consent of both the Petitioner and the Respondent. The Respondent's consent letter has been filed with the Clerk of Court; the Petitioner's consent letter is filed herewith. No counsel for any party authored this brief in whole or in part, and neither any such counsel nor any party nor any person or entity other than *Amici Curiae* or their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

hearings to resolve international custody disputes. The S&W International ChildFind Program has been a member of the International Child Abduction Attorney Network formed by the National Center for Missing and Exploited Children, receiving referrals through that network, as well as through the United States Department of State and other sources.

The Massachusetts Society for the Prevention of Cruelty to Children (the "MSPCC"), based in Boston, Massachusetts, is a 131-year old private non-profit 501(c)(3) society dedicated to leadership in protecting and promoting the rights and well-being of children and families. On April 23, 1878, the MSPCC was incorporated "for the purpose of awakening interest in the abuses to which children are exposed by . . . parents and guardians, and to help the enforcement of existing laws on the subject, procure needed legislation and for kindred work. . . ." Since its inception, MSPCC has contributed to the advancement of child welfare. The MSPCC provides direct services, such as counseling, support and other social services, to more than 30,000 children, adults and families each year. In addition to direct services, the MSPCC has been instrumental in putting dozens of laws on the books regarding everything from abandonment to custody to support. In international child abduction cases, MSPCC has made available qualified professionals for abuse evaluations, provided expert witnesses, and/or joined in *amicus* briefs submitted to the First Circuit, including in *Walsh v.*

Walsh, 221 F.3d 204 (1st Cir. 2000), and *Danaipour v. McLarey*, 286 F.3d 1 (1st Cir. 2002).

Justice For Children ("JFC") is a national child advocacy organization headquartered in Houston, Texas. Formed in 1987, JFC works to protect abused children when the system of governmental agencies responsible for their safety (CPS, family courts, and the criminal justice system) fails to do so. Unlike other child advocacy organizations which work to prevent child abuse through education and social programs, JFC focuses on protecting the abused child after the initial report has been made to the authorities. JFC has offices in Houston and Washington, DC.

Pathways for Children ("Pathways"), based in Gloucester, Massachusetts, was founded in 1967 to provide early education and child care programs. Pathways provides high quality, affordable and comprehensive care, education, recreation and support for children and their families. Some of Pathways' services include infant and toddler day care, head start classrooms, and after school activities. In each program, Pathways focuses on creating a supportive environment where children can learn community values, respect, and education in a nurturing environment. Pathways also provides support to families and offers programs for family involvement. Throughout the past 32 years, Pathways has worked on the local, state, and national levels to create programs for children and families.

Children's Law Center of Los Angeles ("CLC") is a nonprofit, public interest law corporation created 18 years ago and funded by the courts to serve as appointed counsel for the abused and neglected youth of Los Angeles. CLC strives to achieve better standards of care and protection for children in the foster care system, with the belief that troubled foster youth can become troubled adults. CLC attorneys represent children who are at risk of abuse or neglect in juvenile dependency proceedings. In addition, CLC advocates for the critical services and support that these children need. CLC attorneys seek to ensure the children's well being and future success. CLC also works with advocacy groups to identify and implement reform where it is needed.

Emerge was founded in 1977 as the first abuser education and prevention program in the United States. Emerge's mission is to eliminate abuse in intimate relationships by providing intervention and education to abusers and to prevent young people from learning to accept violence in their relationships. The services provided by Emerge include educational and anger management programs, parenting classes, and support groups. Emerge is seeking to ensure that children are not put in abusive situations and to improve institutional responses to domestic abuse.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Labels concerning parental rights can be deceptive or at least less than adequately informative, particularly when used in different countries and by different legislatures, courts, cultures and families. As a practical matter, these labels can lose their case-specific significance in translation. The Fifth Circuit and the District Court ruled, as a matter of law, that the label "*ne exeat*" cannot, as an international travel limitation, when combined only with parental rights labeled "visitation," comprise "rights of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction. The lower courts failed to appreciate that a case-specific rather than categorical approach is necessary, consistent with domestic and international laws, including the United Nations Convention on the Rights of the Child, which support consideration of the best interests of each child whose welfare can be affected by judicial proceedings. A universally recognized tenet of child welfare is reflected in Article 3 of the Convention on the Rights of the Child: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Trial courts have inappropriately deemed the best interests of children irrelevant merely because Hague Convention cases should not consist of

full-blown custody battles regarding which parent is better for the child. In this case, as a left-behind parent, the Petitioner introduced sufficient evidence to require the District Court to request the analysis and opinion of the Central Authority of the child's country of habitual residence, here Chile. The Petitioner introduced evidence that he was the child's father, that he had exercised natural parental rights, that a court in Chile had provided him with an express right to prevent the mother from leaving the country with the child, and that Chilean domestic relations law gave rise to additional rights of the father to care for the child. The record did not establish conclusively why the foreign court and parents did not more specifically either remove the father's rights to participate in decision-making regarding where the child resided, or define his rights in the event of an abduction. Parents and family courts can leave gaps in these areas for a variety of good or poor reasons, ranging from efforts to avoid more contentious litigation to inadequate counsel to well-reasoned judicial acts based on the best interests of a child. Without explanation, here the lower courts treated the custody orders as the triggering source from which parental rights sprung, rather than analyzing what inherent or natural parental rights the custody-type orders stripped, if any, and whether the Chilean orders adequately considered the best interests of the child.

In addition, the District Court had at its disposal an internationally-contemplated mechanism for

gathering additional information from the foreign Central Authority, under Article 15 of the Hague Convention, but did not utilize it. The record reflects that the District Court did not even recognize the existence of its discretion to trigger an Article 15 inquiry before rejecting the Petitioner's claim of custody rights. Accordingly, this Court should answer the question presented that the benefits of a *ne exeat* clause *may* constitute rights of custody and should require an Article 15 inquiry before determining otherwise. This Court should therefore reverse or vacate the opinion of the Fifth Circuit and remand this matter to allow the completion of an Article 15 inquiry by the District Court as part of further proceedings consistent with the best interests of the child whose lifelong welfare will be directly affected by this case.

ARGUMENT

I. THE FIFTH CIRCUIT ERRED BY TREATING THE ISSUE OF WHETHER *NE EXEAT* RIGHTS CONSTITUTE "RIGHTS OF CUSTODY," WITHIN THE MEANING OF THE HAGUE CONVENTION, AS A PURE CATEGORICAL ISSUE OF LAW, RATHER THAN AS A CASE-SPECIFIC MIXED QUESTION OF FACT AND LAW.

The Fifth Circuit framed the issue before it as "whether *ne exeat* rights constitute 'rights of custody'" within the meaning of the Hague Convention and

held "that they do not." *Abbott v. Abbott*, 542 F.3d 1081 (5th Cir. 2008). In so doing, the Fifth Circuit reasoned that "[t]he *ne exeat* order thus gave the father a veto right over his son's departure from Chile, but it did not give him any rights to determine where in Chile his child would live." *Id.* at 1087. The District Court noted, in a conclusory manner, that a "careful review of the record reveals that the Chilean family court granted all care and custody rights to Ms. Abbott, despite Mr. Abbott's petitions to the courts for custody of his son." *Abbott v. Abbott*, 495 F. Supp. 2d 635, 637 (W.D. Tex. 2007). Neither the Fifth Circuit nor the District Court identified the source of a gap in the Chilean orders concerning where in Chile the child would reside, such as whether the gap arose from efforts by the parties to avoid more contentious litigation over an issue seemingly not in dispute, whether it arose from inadequate representation, or whether it was the product of well-reasoned judicial action based on the best interests of the child.[2] Neither the Fifth Circuit nor the District Court requested a determination from the foreign Central Authority regarding its views of the father's rights under Chilean law.

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[2] The Fifth Circuit mentioned that, in one order, the Chilean trial court refused to award the father a grant of full custody, but the record is bare on what that exactly meant, let alone why the Chilean court prohibited international but not domestic changes in the child's residence.

A. While Hague Convention Cases Should Not Entail Full-Blown Custody Battles Regarding Who is the Best Parent, Court Decisions Affecting the Welfare of a Child or Children Require Individual Consideration of the Best Interests of the Particular Child or Children.

Hague Convention cases trigger not only consideration of the treaty itself and its implementing statute, the International Child Abduction Remedies Act, 42 U.S.C. § 11601, *et seq.*, but also consideration of traditional principles of comity and the fundamental safeguards throughout the courts of the United States and elsewhere that protect the best interests of children.

1. A Determination of Whether to Defer to Foreign Law Requires Consideration of Whether it Adheres to Fundamental Principles and Mores Embodied in Domestic Law, Such as Protection of the Best Interests of Children.

The policies underlying the Hague Convention are complemented by traditional principles of comity as they relate to the judgments of foreign nations. Under that longstanding concept, valid judgments rendered by the courts of foreign nations, although not as conclusively entitled to full faith and credit as the judgments of sister states, are accorded similar

recognition when rendered in a manner consistent with fundamental principles and mores embodied in domestic law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§102(2), 102 cmt. b., 415 (1987); *see also Medellin v. Dretke*, 544 U.S. 660, 670 (2005) (Ginsburg, J., concurring), *citing* ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute § 2, Comment *d*, p. 38 (2005); *Hoyt v. Sprague*, 103 U.S. 613, 631 (1881) ("in the due exercise of comity," preference would ordinarily be given to "the authority of guardian in the minor's own country"). Comity, as traditionally applied, provides recognition of foreign judgments, but not if they were rendered in a manner inconsistent with fundamental laws and procedures, or public policy, of the United States. *See Dennick v. Cent. R. Co. of New Jersey*, 103 U.S. 11, 11 (1880) (principles of comity favor honoring foreign law or orders "if not contrary to the public policy of the country where the suit is brought, nor to abstract justice or pure morals"); *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 106 (1969). This principle is limited by concerns over fundamental rights, due process and public policy; where it is apparent that the foreign judgment violates any of these, it is undeserving of recognition. *See, e.g., Griffin v. Griffin*, 327 U.S. 220, 228-29 (1946), *citing Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 401 (1917); *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 23 (1907); *Nat'l Exch. Bank v. Wiley*, 195 U.S. 257 (1904).

Under the guidance of the Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA"), which is now in force in all but two states in the country,[3] domestic family courts provide recognition to foreign child custody orders but only if

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[3] *See* ALA. CODE § 30-3B-105 (2009); ALASKA STAT. § 25.30.810 (2009); ARIZ. REV. STAT. § 25-1005 (2009); ARK. CODE ANN. § 9-19-105 (2009); CAL. FAM. CODE § 3405 (West 2009); COLO. REV. STAT. § 14-13-105 (2005); CONN. GEN. STAT. § 46B-115D (2009); DEL. CODE tit. 13, § 1905 (2009); D.C. CODE § 16-4601.04 (2009); FLA. STAT. § 61.506 (2009); GA. CODE ANN. § 19-9-44 (2009); HAW. REV. STAT. § 583A-105 (2009); IDAHO CODE ANN. § 32-11-105 (2009); 750 ILL. COMP. STAT. § 36/105 (2009); IND. CODE. § 31-21-1-3 (2009); IOWA CODE § 598B.105 (2009); KAN. STAT. ANN. § 38-1340 (2008); KY. REV. STAT. ANN. § 403.806 (West 2009); LA. REV. STAT. ANN. § 13:1805 (2008); ME. REV. STAT. ANN. tit. 19-A, § 1735 (2009); MD. CODE ANN., FAM. LAW § 9.5-104 (West 2009); MICH. COMP. LAWS § 722.1105 (2009); MINN. STAT. § 518D.105 (2009); MISS. CODE ANN. § 93-27-105 (2008); MO. REV. STAT. § 452.720 (2009); MONT. CODE ANN. § 40-7-136 (2007); NEB. REV. STAT. § 43-1230 (2009); NEV. REV. STAT. § 125A.225 (2008); N.H. REV. STAT. ANN. § 458-A:4 (2009) (effective December 1, 2010); N.J. REV. STAT. § 2A:34-57 (2009); N.M. STAT. § 40-10A-105 (2009); N.Y. DOM. REL. LAW § 75-d (2009); N.C. GEN. STAT. § 50A-105 (2009); N.D. CENT. CODE § 14-14.1-04 (2008); OHIO REV. CODE ANN. § 3127.04 (West 2009); OKLA. STAT. tit. 43, § 551-105 (2009); OR. REV. STAT. § 109.714 (2003); 23 PA. CONS. STAT. § 5405 (2009); R.I. GEN. LAWS § 15-14.1-5 (2008); S.C. CODE ANN. § 20-7-6008 (2007); S.D. CODIFIED LAWS § 26-5B-105 (2009); TENN. CODE ANN. § 36-6-208 (2009); TEX. FAM. CODE ANN. § 152.105 (Vernon 2009); UTAH CODE ANN. § 78B-13-105 (2009); VA. CODE ANN. § 20-146.4 (2009); WASH. REV. CODE § 26.27.061 (2005); W. VA. CODE § 48-20-105 (2009); WIS. STAT. § 822.05 (2009); WYO. STAT. ANN. § 20-5-205 (2009).

they do not run contrary to fundamental human rights:

> (a) A court of [the relevant] State shall treat a foreign country as if it were a State of the United States for the purpose of applying [Articles] 1 and 2.
>
> (b) Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act] must be recognized and enforced under [Article] 3.
>
> ***(c) A court of this State need not apply this [Act] if the child custody law of a foreign country violates fundamental principles of human rights.***

UCCJEA § 105 (emphasis added).[4] As discussed further below, the need to consider the best interests of children is a "fundamental principle of human rights."

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[4] The only two states not to have enacted the UCCJEA are Massachusetts and Vermont. Both of those states have adopted the Uniform Child Custody Jurisdiction Act, which also applies principles of comity to foreign custody determinations so long as fundamental principles of those states' laws are satisfied. *See* MASS. GEN. LAWS ch. 209B, § 14 (2007); VT. STAT. ANN. tit. 15, § 1051 (2002).

2. The Convention on the Rights of the Child Requires Consideration of the Best Interests of the Child in All Proceedings Concerning Children.

The established law of the international community requires consideration of the "best interests of the child" in all cases involving children. This law is reflected in a central theme of the United Nations Convention on the Rights of the Child (the "CRC"), which provides, in relevant part, that:

> *In all actions concerning children*, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration*.

CRC Article 3 § 1 (emphases added). The CRC is the most widely accepted human rights treaty in the world and has been ratified by 193 countries.[5] The United States signed the CRC in February 1995, but stands virtually alone as one of only two members of the United Nations that have not yet ratified it (the other being Somalia, which lacks an internationally recognized government).

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[5] The United Nations Treaty Collection provides an official list of nations that have signed and/or ratified the CRC, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

As a signatory to the CRC, the United States is obliged under Article 18(a) of the Vienna Convention on the Law of Treaties (the "Vienna Convention")[6] not to act in a manner that would defeat the "object and purpose" of the CRC. The Vienna Convention, while not yet formally ratified by the United States, is relied on by courts and the United States Department of State as the authoritative guide to existing treaty law and procedure. *See* The Vienna Convention on the Law of Treaties, S. Exec. Doc. No. 92-1, 92d Cong., 1st Sess. 1 (1974); *see also Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting) (citing to the Vienna Convention when interpreting the United Nations Convention Relating to the Status of Refugees); *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001) ("We apply the rules of customary international law enunciated in the Vienna Convention on the Law of Treaties"); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1296 n.40 (11th Cir. 1999) ("Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the

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[6] Article 18(a) of the Vienna Convention provides:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty[.]

international law of treaties." (citation and quotation omitted)).

Because customary international law[7] requires that each child's best interests be considered in cases involving children, so too in the United States should the child's best interests be considered in all such cases. Customary international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900); *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.").

This Court should here, as it has done previously, give due weight to persuasive, customary international law. In *Roper v. Simmons*, 543 U.S. 551, 575-76 (2005), for example, this Court discussed the weight to be given to international law with regard to the imposition of the death penalty on juvenile

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[7] The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES provides that customary international law results from "a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). The American Law Institute commented that "[a] practice can be general even if it is not universally followed; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity." *Id.* § 102 cmt. b.

offenders, and recognized the "stark reality" that the United States was the only country in the world that "continue[d] to give official sanction to the juvenile death penalty[,]" and referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments. *Id.* at 575 (citations omitted). The Court specifically referred to the CRC as instructive, not just on international law, but also on domestic constitutional law, noting that "every country in the world has ratified [the CRC] save for the United States and Somalia." *Id.* at 576-78. Here, as in *Simmons*, this Court should give due weight to the "overwhelming weight of international opinion" adopting the CRC and requiring consideration of the best interests of the child. To do otherwise would defeat one of the primary objectives of the CRC (and, in turn, violate Article 18(a) of the Vienna Convention), which is to make the best interests of the child a "primary consideration" in all actions concerning children. CRC Art. 3 § 1.

Several courts in Hague Convention cases have recognized that the best interests of children, including for example concerns over the child's safety, must be considered. The First Circuit has persuasively explained that "the protection of the child must remain paramount," *Danaipour v. McLarey*, 286 F.3d 1, 26 (1st Cir. 2002), making decisions regarding whether to return children in complex circumstances "[a]mong the federal courts' most

difficult and heart-rending tasks," *id.* at 4.[8] While Hague Convention cases should not turn into

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[8] The official commentary to the Hague Convention provides that, "the Convention does not seek to regulate the problem of the award of custody rights[,]" and that "any debate on the merits of [custody rights] . . . should take place [in the country of habitual residence]." *See* Elisa Perez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention: Hague Conference on Private International Law P 84, in 3 Acts and Documents of the Fourteenth Session 426, at 430 ¶ 19 (1980), http://hcch.e-vision.nl/upload/expl28.pdf. While proceedings under the Hague Convention should not become full-blown custody battles, courts have improperly conflated the merits of custody concerns with the relevance of the best interests of the child. *See, e.g.*, *Kufner v. Kufner*, 519 F.3d 33, 40 (1st Cir. 2008) (explaining that the "best interests of the child standard" applies in custody matters and custody is not the issue in a Hague Convention case); *Diorinou v. Mezitis*, 237 F.3d 133, 145 (2d Cir. 2001) (Article 13 was not intended to be used by defendants as a vehicle to litigate or re-litigate the child's best interests); *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001) (The Hague Convention is not designed to resolve underlying custody disputes); *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005) (custody litigation in state court revolves around findings regarding the best interest of the child, relying on the domestic relations law of the state court, which is distinct from an adjudication of a Hague Convention petition that focuses on findings of where the child was habitually located and whether one parent wrongfully removed or retained the child); *Cantor v. Cohen*, 442 F.3d 196, 207 (4th Cir. 2006) ("The Hague Convention aims to have judicial authorities decide whether a child has been wrongfully removed or retained in violation of existing custody rights, or whether existing access rights are being violated, not whether the petitioning parent is better suited to serve as custodian."); *Simcox v. Simcox*, 511 F.3d 594, 607 (6th Cir. 2007) ("child's best interests" analysis is not the proper standard under the Convention); *In re B. Del C.S.B.*, 559 F.3d 999, 1013 (9th Cir. 2009) (the Convention is concerned with

(Continued on following page)

full-blown custody battles, nothing in the Hague Convention is inconsistent with the requirement under international law that courts *must* consider the best interests of children whose welfare is at stake in proceedings.[9] After all, a primary purpose for the powers granted to courts under the Hague Convention is to promote the best interests of the child by preventing parents from abducting children to different countries in search of more favorable custody laws. *See Baxter v. Baxter*, 423 F.3d 363, 367 (3d Cir. 2005) ("Convention's procedures are designed to restore the status quo prior to any wrongful removal or retention, and to deter parents from engaging in international forum shopping in custody cases."), citing *Feder v. Evans-Feder*, 63 F.3d 217, 221

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the present, and not with determining the best interests of the child in the long term); *Ohlander v. Larson*, 114 F.3d 1531, 1541 (10th Cir. 1997) ("Under the Convention, a child is to be expediently returned to his or her state of habitual residence so that a court there can examine the merits of the custody dispute and award custody in the child's best interests.") (internal quotation omitted).

[9] Recognizing the potential harm caused by wrongfully abducting children to another country, Article 3 of the Hague Convention provides courts with power to return the abducted child to his country of habitual residence where the custody issues will be resolved. But this power is not unlimited; under Article 13, for example, a court is not required to return the child to his country of habitual residence if it is not in the best interest of the child (*i.e.* the return poses a grave risk of harm or an otherwise intolerable situation, or if the petitioning parent never had a right to determine the residence of the child, or if the child has been in the new country for more than a year and is settled into his new environment).

(3d Cir. 1995); *Yang*, 416 F.3d at 201 ("The Hague Convention's goal is to 'protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.'" (quoting the Hague Convention Preamble, 19 I.L.M. 1501, 1501 (1980))).

3. The Fifth Circuit and District Court Failed to Consider the Best Interests of the Child and Whether Chilean Law Adequately Considered the Best Interests of the Child.

When treating an order containing a *ne exeat* clause as if it were the triggering and dispositive source of rights subject to the Hague Convention, the Fifth Circuit and the District Court failed to consider whether the foreign orders stripped parental rights or, if so, whether they took adequately into account the best interests of the child. When failing to address the preexisting parental rights under Chilean law and any specific basis for stripping them down to a *ne exeat* clause, the lower courts here failed even to refer at all to the best interests of the child, let alone to determine whether Chilean courts had adequately addressed those interests or to consider how the denial of the Hague Convention petition would affect those interests. The fundamental need to protect children can be frustrated by any determination that views the existence *vel non* of a *ne exeat*

clause as dispositive, without further consideration of whether each child's best interests have been adequately taken into account.

The lower courts here failed to consider adequately: (1) whether the Chilean court intended the order containing the *ne exeat* clause to strip the father of preexisting parental rights that arose by operation of law[10]; (2) whether the Chilean court adequately considered the best interests of the child when making its rulings; (3) whether the father's rights to care for the child for a full month in the summer along with frequent visits throughout the year amounted to the father's right to determine the residence of the child during those periods thereby giving rise to custodial rights; and, (4) whether the Chilean Central Authority considered the removal of the child to be in breach of rights of custody under Chilean law and therefore "wrongful" under Article 3 of the Hague Convention.

B. In the Absence of Justification, Child Abductions Pose Serious Risks to the Development of the Victimized Children.

An important objective served by a broad interpretation of "rights of custody" is that the best

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[10] Under Article 3 of the Hague Convention, international law expressly honors "rights of custody" not only as set forth in custody orders, but also that arise by operation of law or from an agreement between the parents.

interests of children often, though not always, will be served by returning them to the status quo in their country of habitual residence. By ignoring the best interests of the child and failing to assess whether Chilean courts had adequately considered those interests, the lower courts undervalued the adverse consequences to an abducted child. International child abductions impose serious psychological and developmental effects on children. Multiple studies have shown that children who are abducted by a parent, thereby separated from the other parent and their support systems, can suffer from a wide range of psychological issues ranging from depression and acute stress disorder to post traumatic stress disorder and identity formation issues. *See* Nancy Faulkner, *Parental Child Abduction is Child Abuse* (1999-2006), presented to the United Nations Convention on Child Rights in Special Session June 9, 1999, http://www.prevent-abuse-now.com/unreport.htm; Dorothy S. Huntington, *Parental Kidnapping: A New Form of Child Abuse* (1982), http://207.58.181.246/pdf_files/library/Huntington_1982.pdf. These far reaching and serious psychological effects can last long after the child is returned. Geoffrey L. Greif, *A Parental Report on the Long-Term Consequences for Children of Abduction by the Other Parent*, 31 Child Psychology and Human Development 59, 70 (Fall 2000).

In a peer-reviewed study by Nancy Faulkner presented to the United Nations Convention on Child Rights, it was found that there are many potential

psychological and developmental ramifications to unjustified parental abductions. The conclusions of this study found that

> Children who have been psychologically violated and maltreated through the act of abduction are more likely to exhibit a variety of psychological and social handicaps. These handicaps make them vulnerable to detrimental outside influences.

Faulkner, *Parental Child Abduction is Child Abuse*, *supra*, at 2 (citing D.C. Rand, *The Spectrum of the Parental Alienation Syndrome*, Am. Journal of Forensic Psychology, 15-3 (1997)). Specifically, abducted children can suffer from depression; loss of community; loss of stability, security, and trust; excessive fearfulness, even of ordinary occurrences; loneliness; anger; helplessness; disruption in identity formation; and fear of abandonment. Huntington, *Parental Kidnapping: A New Form of Child Abuse*, *supra*. These disorders emerge from the anxiety produced by the abductions as well as the displacement of the children from their entire support systems, including their relationships with the left-behind parents. Faulkner, *Parental Child Abduction is Child Abuse*, *supra*, at 4-5. "[F]or a child 'it is not possible to develop true self-esteem and find peace without resolving differences and emotional pain due to stressed or damaged emotional ties to parents and family.'" *Id.* at 5. Children may suffer physical

manifestations of stress such as problems with their immune systems, sleep disorders, stomach aches, headaches, and trouble academically. Faulkner, *Parental Child Abduction is Child Abuse, supra*, at 8; Huntington, *Parental Kidnapping: A New Form of Child Abuse, supra*, at 12-13. It is also common that the abducting parent and child are on the run from authorities, making the abducting parent unable or unwilling to put the child's needs first, including food, education, and emotional support. "The needs of the troubled parent override the developmental needs of the child, with the result that the child becomes psychologically depleted and their own emotional and social progress is crippled." Faulkner, *Parental Child Abduction is Child Abuse, supra*, at 3. All of these scenarios and stresses place an abducted child at risk of severe psychological harm, which may last indefinitely, particularly if courts sanction and validate the abduction by not returning the child.

In addition, courts have recognized the serious psychological impact of abductions on children, in particular the impact of being separated from one parent. *E.g.*, *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996) ("Under the logic of the Convention, it is the *abduction* that causes the pangs of subsequent return."). In 2005, a state trial court upheld an eight-figure jury verdict based on the emotional distress that resulted from an international child abduction. *See Streeter v. Executive*

Jet Mgmt., Inc., No. X01-02-0179481-S, 2005 WL 4442352, at *8 (Conn. Super. Nov. 10, 2005). The court there explained that the abducting parent had informed the children that the left-behind mother no longer wanted to see them and, should anyone ask about her, they should say she had died. *Id.* at *4. Further, the court found that, after they were returned to their mother, as a result of the abduction, the children exhibited fear of being left alone, fear of going upstairs alone, anger toward their father, academic problems due to memory loss, and fear of their mother leaving them. *Id.* These psychological symptoms appeared consistent with those found in the Faulkner study and other literature.

Each victim can experience any of a wide range of resulting maladies, leading experts to conclude:

> As adults, many victims of bitter custody battles who had been permanently removed from a target parent, whisked away to a new town and given a new identity, still long to be reunited with the lost parent. The loss cannot be undone. Childhood cannot be recaptured. Gone forever is that sense of history, intimacy, lost input of values and morals, self-awareness through knowing one's beginnings, love, contact with extended family, and much more. Virtually no child possesses the ability to protect him- or herself against such an undignified and total loss.

Faulkner, *Parental Child Abduction is Child Abuse*, *supra*, at Conclusion (citing S.S. Clawar & B.V. Rivlin,

Children Held Hostage: Dealing with Programmed and Brainwashed Children, ABA Section of Family Law, ISBN No. 0-89707-628-1, p. 105). The psychological and developmental effects of an abduction are considerable, and should play a role in the adjudication of Hague Convention cases. Indeed, such inherent harm to children flowing from abductions presents yet another reason for broadly interpreting the parental rights that constitute rights of custody under the Hague Convention.

C. The Meaning of Labels Regarding Parental Rights Can Vary Among Countries, Courts, Cultures, and Families, Thereby Presenting Mixed Questions of Law and Fact.

The meaning of custodial terms, or default custody rights can vary among countries, cultures, courts and families. For example, in certain Islamic nations, gender and religion generally dictate custody and travel rights and obligations between parents. Jamal J. Nasir, *The Islamic Law of Personal Status* 187 (Graham & Trotman, 2d ed. 1990). While fathers are automatically given legal decisionmaking rights over children, in many cases under Shari'a law, a form of physical custody of the child is given automatically to the mother until that child reaches a certain age. *Id.* This form of custody does not entitle mothers to travel with children outside of the country. When a boy reaches the age of seven or a girl reaches

the age of nine, that child is considered to be past the "years of dependency" and is then placed in the custody of the father or a full-blooded male relative of the father. *Id.* While most if not all Islamic nations are not presently signatories to the Hague Convention, their systems pose an extreme example of how custody-type labels vary from country to country, or from culture to culture.

Countries utilize a variety of default mechanisms when there is not a formal custody arrangement in place. These too can be misconstrued by the courts. Questions abound that can serve as simple exercises that illustrate the different meanings that can be ascribed to labels by different countries, cultures, courts, and families. What if the pertinent Chilean court order had expressly stated that "the *ne exeat* clause was intended to constitute rights of custody under the Hague Convention"? Or what if it specifically stated that "no right of custody is intended to be created by the *ne exeat* clause, but rather only a local remedy"? Would the calculus change if the *ne exeat* provision were part of an agreement by the parties instead of a court order? What if, only in a laudable effort to avoid contentious litigation, the parents chose not to seek a court order regarding who decides where the child lives inside of Chile? Would it matter whether the child had always lived in one residence and no reason existed to predict a move? Or what if the foreign court delineated rights based purely on gender or racial discrimination? Obviously various circumstances that serve as a

backdrop to a *ne exeat* clause can inform its meaning. The determination of whether, in particular circumstances, a *ne exeat* clause gives rise to rights of custody poses not just a legal question, but rather a mixed question of law and fact.

II. AS A MATTER OF LAW, THE PETITIONER MET HIS BURDEN OF TRIGGERING AN INQUIRY BY THE DISTRICT COURT OF THE CENTRAL AUTHORITY OF CHILE FOR ITS OPINION ON THE ISSUE OF RIGHTS OF CUSTODY IN THIS MATTER, UNDER ARTICLE 15 OF THE HAGUE CONVENTION.

It is noncontroversial, if not axiomatic, that the determination of whether a child has been wrongfully removed from his country of habitual residence should be analyzed under the substantive law of that foreign country, not of the removed-to country. Courts adjudicating Hague Convention matters have routinely engaged in careful analyses of foreign law. *See, e.g., Whallon v. Lynn*, 230 F.3d 450, 456-59 (1st Cir. 2000) (affirming a rigorous analysis by the trial court of parental rights under the pertinent foreign law). To ensure that the correct interpretation of the legal concepts is employed, including (but not limited to) *ne exeat* clauses such as the one at issue, courts should request a determination from the Central Authority of the foreign country when there is at least a *prima facie* showing of parental status and a legitimate dispute over the meaning of foreign legal labels.

The Convention specifically provides a mechanism for this undertaking through Article 15, which states:

> The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

http://www.hcch.net/index_en.php?act=conventions.text&cid=24. The express language of Article 15 vests in the District Court the responsibility for initiating such an inquiry when necessary.[11]

Courts routinely obtain a determination from the foreign Central Authority pursuant to Article 15 by directing the applicant to obtain the determination or by making the request itself. *See, e.g., Silverman v.*

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[11] Because the Convention expressly contemplates that the District Court will trigger an Article 15 inquiry, a petitioner's failure to request such an inquiry should not amount to a waiver, and should not result in plain error review of a lower court's failure to direct the inquiry.

Silverman, 338 F.3d 886, 892 (8th Cir. 2003); *Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634, 639 (E.D.N.Y. 2000). In *Bader v. Kramer*, 445 F.3d 346 (4th Cir. 2006), German law appeared to provide, as a default matter, that joint custody existed between parents until a court ordered otherwise. The German family court in *Kramer* entered a visitation schedule before the child was taken to the United States. *Id.* at 350. While the trial court concluded that the visitation order altered the joint custody arrangement, the appellate court concluded otherwise. *Id.* When reversing the trial court, the Fourth Circuit relied on a letter from the German Central Authority explaining that, under German law, both parents still possessed custody rights. *Id.* at 351.

Here, the Petitioner introduced sufficient evidence to require the District Court to obtain a similar determination under Article 15 of the Hague Convention, from the Chilean Central Authority, before it could have properly found custody rights lacking. The Chilean Central Authority could then have offered an opinion concerning whether the Respondent had "wrongfully removed" the child from Chile based on the existence of the *ne exeat* clause and any other parental rights within the meaning of Article 3 of the Convention. Obtaining the foreign country's determination is particularly important when there is a significant range of reasonable interpretations among courts as to the meaning of a particular type of parental right such as that embodied in a *ne exeat* order. The majority of foreign

countries have decided that *ne exeat* orders coupled with a right of access gave rise to custodial rights as defined under the Hague Convention. *See* Sara E. Reynolds, *International Parental Child Abduction: Why We Need To Expand Custody Rights Protected Under The Child Abduction Convention,* 44 Fam. Ct. Rev. 464, 472 (July 2006). Courts in the United States have split on the significance of such provisions. One of the objectives of the Hague Convention is uniformity of interpretation of foreign laws such that the "rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States." Article 1(b); *Furnes v. Reeves*, 362 F.3d 702, 716 (11th Cir. 2004). The proper consistency can be achieved only by the courts obtaining a determination from the foreign country as to the meaning of its own orders and laws. Given the questions below, the District Court should have exercised its discretion to obtain an Article 15 determination.

A. When a District Court Possesses Discretion, It Cannot Simply Ignore that Discretion.

Because courts possess discretion to obtain an Article 15 determination, that discretion must be considered by the Court and acted upon appropriately. *See Gall v. United States*, 552 U.S. 38, 53 (2007) (explaining that lower courts abuse their discretion when they have "ignored or slighted" the existence of their discretion or a relevant factor).

Here, the Fifth Circuit and District Court erred by not even recognizing the District Court's discretion to seek an Article 15 determination, let alone appropriately exercising that discretion when assessing the existence of custodial rights as required by Article 3 of the Hague Convention. *Ne exeat* orders are known to have different meanings in different countries, which the lower courts here specifically acknowledged. *See Abbott v. Abbott*, 542 F.3d 1081, 1084 (5th Cir. 2008) (recognizing that "courts in the United Kingdom, Australia, South Africa, and Israel have held that *ne exeat* rights do constitute 'rights of custody' under the Hague Convention," while Canadian and French courts have reached the contrary conclusion). Here, the District Court ignored and therefore abused its discretion to seek the official Chilean view of the meaning of the custody orders without seeking a determination from Chile. *Cf. Gall*, 552 U.S. at 53; *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997) (in Hague Convention case, explaining that "[a] clear example of an abuse of discretion exists where the trial court fails to consider the applicable legal standard or the facts upon which the exercise of its discretionary judgment is based").

Lower courts in other cases have engaged in much more rigorous reviews of foreign law to find that a petitioner possessed rights of custody. Courts have thoughtfully applied Article 3's express statement that custody rights may arise from a country's common law or from agreements between the parents, even in the absence of custody orders.

E.g., *Whallon*, 230 F.3d at 456, 457 n.7. Here, the lower courts failed to determine whether the father had custody rights under Chilean common law or other source, such as the doctrine of *patria potestas*, which has been interpreted to signify "a meaningful, decisionmaking role in the life and care of the child, and not the mere access to the child associated with visitation rights." *Id.* at 457. Even the doctrine of *patria potestas* has different meanings in different countries and "highlights the difficulties in imposing Anglo-American definitions of custody on legal systems, . . . that have different origins and traditions." *Id.* at 458. The most effective way to overcome these difficulties and to understand the custodial rights of parents in another country is to obtain the determination from the Central Authority of the country of habitual residence. Here, given the Petitioner's demonstration of paternity, his past exercise of parental rights, the *ne exeat* clause, and citations to Chilean common law, the Fifth Circuit and District Court simply did not have sufficient information about Chilean law to find custody rights lacking, and the District Court abused its discretion by not obtaining an Article 15 determination.

B. Because of the Interests of Abducted Children, the Article 15 Duty Should Be Self-Executing.

Article 15 expressly contemplates a court triggering an inquiry of a foreign Central Authority

for its opinion on whether a removal of a child violates rights of custody under the laws of the foreign country of habitual residence. *Cf. Sorenson v. Sorenson*, No. 07-4720 (MJD/AJB), 2008 U.S. Dist. LEXIS 21778, at *3 (D. Minn. Mar. 19, 2008); *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1148 (E.D. Wash. 2007). Courts can improve the quality of Article 15 determinations by seeking them directly, rather than leaving or passing them to or through litigants, who could present biased versions of underlying facts to foreign Central Authorities. In addition, often indigent or of limited means, left-behind parents face enormous difficulties litigating Hague Convention cases in what to them are foreign countries. Children often remain unrepresented. By controlling the Article 15 process, the court can ensure not only the accuracy of the content and scope of the inquiry, but also can ensure the completion of an inquiry consistent with the interests of the children who may have the most at stake in these proceedings. *Cf. Norden-Powers*, 125 F. Supp. 2d at 639. And because the courts expressly possess the authority to trigger the Article 15 inquiry, and because such inquiries can be crucial to the protection of children from abductions, it is an error by a trial court itself to fail to commence such an inquiry when one would be appropriate.

Here, the Petitioner introduced sufficient evidence to require either a finding in his favor on the issue of whether he possessed "rights of custody," or to require an Article 15 inquiry before the lower

courts could reject his claim of "rights of custody." Even though the record suggests that the Petitioner did not request an Article 15 inquiry, the error still rests with the courts below, thereby negating any waiver or need for "plain error" review. To hold otherwise would penalize a victimized child and sanction a kidnapping that separates him indefinitely from one of his parents.

CONCLUSION

Based on the foregoing, the *Amici Curiae* respectfully submit that this Court should reverse or vacate the decision of the Fifth Circuit and remand the matter for further proceedings. The existence of *ne exeat* clauses like the present one *may* constitute rights of custody and should require Article 15 inquiries before a court finds custody rights lacking. When facing such issues, courts adjudicating Hague Convention matters must consider the best interests of the pertinent children, including whether foreign orders affecting them and Article 15 determinations have adequately considered such interests. In addition, once a parent has introduced sufficient evidence of parental status and legal rights that could lead reasonable minds to differ regarding whether they amount to rights of custody, the trial court should commence an Article 15 inquiry before

rejecting a petition based on a failure to demonstrate rights of custody.

Respectfully submitted,

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AMICUS CURIAE BRIEF

08-645

IN THE

Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,

Petitioner,

—v.—

JACQUELYN VAYE ABBOTT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF DELEGATES LAWRENCE H. STOTTER AND MATTI SAVOLAINEN, ON THE DRAFTING AND NEGOTIATING OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the drafters of the Hague Convention on the Civil Aspects of International Child Abduction intended *ne exeat* orders, which prevent one parent from removing a child from the jurisdiction without the consent of the other parent, to be a "right of custody" such that violation of a *ne exeat* order gives rise to the drastic "right of return" of the child under the Hague Convention.

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INTERESTS OF AMICI CURIAE*

The Amici Curiae, Messrs. Lawrence H. Stotter and Matti Savolainen, served as delegates from the United States and Finland, respectively, to the Fourteenth Session of the Hague Conference on Private International Law, which drafted the Hague Convention on the Civil Aspects of International Child Abduction. As delegates, they participated in the negotiation and drafting of the terms of the Hague Convention. They have clear memories of the intent of the delegates, and the result that the drafters were looking to obtain when they crafted the Hague Convention's provisions. They are interested to see that the integrity of the Hague Convention, as written and as intended by the drafters, is preserved and that the true intent of the drafters is presented to the Court to aid the Court in its interpretation of this important international agreement.

SUMMARY OF ARGUMENT

Typically, when charged with determining the intent of the drafters of an agreement, a court is forced to wade through what amounts to

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* The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

circumstantial evidence, collecting the available pieces of the puzzle and ultimately making the best guess as to what other individuals, operating at another point in history, were thinking and attempting to accomplish. That guesswork is not necessary here. Mr. Lawrence H. Stotter was one of only five delegates chosen to represent the United States at the Hague and one of only two with true expertise in the area of child custody issues. His impressive background as a leading family law practitioner led the then-president of the American Bar Association to suggest to the U.S. Secretary of State that Mr. Stotter be appointed to represent the United States' interests in the negotiation and drafting of the Hague Convention. Similarly, Mr. Matti Savolainen, who has negotiated and drafted numerous international conventions and treaties, served as the Finnish delegate to the Hague Conference. He was also one of only five members of the Drafting Committee, which was charged with memorializing in final written form the conclusions reached during the Convention negotiations.

Both of these delegates have strong and clear recollections of the intent of the drafters at the time that the Hague Convention was negotiated and finalized. They share their memories of the process here, and provide a rare firsthand account of their intent during the negotiations, thus eliminating the need for much of the circumstantial puzzle-working that would otherwise be required. Both Mr. Stotter and Mr. Savolainen (the "Drafters") are clear that the drastic "right of return," which mandates immediate return of a child to the country of habitual residence in the case of abduction, was

expressly reserved for violations of "rights of custody." By contrast, "rights of access," *i.e.*, visitation rights, were not granted that drastic remedy after much debate. The delegates were fully aware of *ne exeat* orders, and their absence from mention in the text of the Convention is no mistake. The Drafters did not intend that a *ne exeat* order would confer a right of custody. The Drafters' recollection is summarized as follows:

1. The distinction between rights of custody and rights of access was much debated, heavily negotiated, and intended to be a critical difference within the framework of the Convention.

2. The right of return was exclusively reserved for remedying breaches of rights of custody.

3. Breaches of rights of access were granted less drastic and non-mandatory remedies, which did not include a right of return.

4. The delegates were fully aware of *ne exeat* orders, but did not include them in the discussions and negotiations when defining rights of custody, or when determining what the remedy would be for violation of such custody rights.

5. The drafters did not intend for *ne exeat* orders to convert rights of access, *i.e.*, visitation rights, into rights of custody.

6. The drafters did not intend for a *ne exeat* order to be construed as a right of custody.

7. The drafters did not intend for a violation of a *ne exeat* order to give rise to the drastic remedy of a right of return.

8. The only time rights similar to the rights granted under a *ne exeat* order were raised in the negotiations, they were referenced as an example of an access right. After considering that example, the drafters soundly defeated a proposal that such access rights be given the remedy of a right of return.

9. The United States delegation, in particular, would have strongly opposed any attempt to qualify a *ne exeat* order as granting a right of custody that would give rise to a right of return.[1]

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[1] Ms. Jamison Selby Borek, who served as a U.S. delegate along with Mr. Stotter, has reviewed this submission. Ms. Borek represented the U.S. State Department at the Conference, and, as described below, assumed the role of lead U.S. spokesperson at the plenary session of the Conference where the final drafting and negotiations of the Convention took place. Ms. Borek reports that the recollections of the Drafters set forth herein are consistent with her own recollection of the intent and purpose of the terms of the Convention.

ARGUMENT

I. THE INTENT OF THE DRAFTERS IS PROPERLY CONSIDERED BY THE COURT.

A. Negotiating History and Intent Are Relevant When Interpreting a Convention.

The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10494 (1986) [hereinafter Hague Convention or Convention], implemented by the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 *et seq.* (1995), is an international treaty to which the United States and approximately 80 other countries are signatories. The Convention was convened to address the "necessity to find a solution to a problem which caused harm to children and suffering to parents ... to ensure the return of abducted children as quickly as possible and with as few legal formalities as possible." ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, *Procès-verbal No 2*, TOME III [hereinafter TOME III], 257-61 at 257.

When interpreting an international treaty, such as the Hague Convention, the Court may look beyond purely textual definitions to the broader meaning of the Convention, and assess the "ordinary meaning to be given to the terms of the treaty in their context and in the light of [the Convention's] object and purpose." Vienna Convention on the Law

of Treaties, May 23, 1969, art. 31.1, 1155 U.N.T.S. 331, 340 (stating general rule on the interpretation of treaties).

The Court's inquiry "begin[s] 'with the text of the treaty and the context in which the written words are used.'" *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988), quoting *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 534 (1987). *Accord Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989). However, "treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Air France v. Saks*, 470 U.S. 392, 396 (1985) (citing *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943)); *see also Eastern Airlines, Inc v. Floyd*, 499 U.S. 530, 534-35 (1991) (same). "In interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation." *Air France*, 470 U.S. at 400. The Court has also considered it appropriate to consult external sources that establish the purposes of the treaty, its drafting history, and its post-ratification understanding. *See El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167-76 (1999).

Accordingly, the Court may properly consider the recollections of the Drafters that are presented here. *See Air France*, 470 U.S. at 402-03 (considering statements of delegates and members of drafting committee to determine meaning of Warsaw Convention). "Because a treaty ratified by the

United States is not only the law of this land ... but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux preparatoires*) ... of the contracting parties." *See id.* at 400. Indeed, overlooking the intentions of the drafters and amending judicially the Convention text is impermissible, for it "would be to make and not construe a treaty." *See Chan*, 490 U.S. at 135 (internal quotation marks omitted).

B. Mr. Stotter and Mr. Savolainen Are Credentialed Participants in the Drafting of the Hague Convention.

The Hague Convention on the Civil Aspects of International Child Abduction was initially drafted over the course of two meetings of the Special Commission on international child abduction in 1979, at the Peace Palace in The Hague. The first meeting took place from March 12-22, 1979. *See* Elisa Pérez-Vera, *Report of the Special Commission*, TOME III, 172-214, 176 at ¶ 14 (1980). The delegates at the first meeting were not able to reach a consensus on the necessary provisional conclusions, nor did they produce a draft. *Id.* The second meeting was held from November 5-16, 1979, over the course of sixteen sessions, along with additional meetings of the drafting committee and two *ad hoc* committees. *See id.* at 176. The second Special Commission meeting adopted the text of a Preliminary Draft that was subsequently presented to the full Convention. *Id.*

The Plenary Session of the Fourteenth Session of the Hague Conference met from October 6-25, 1980. *See* Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, TOME III, 426-76, 426 at ¶ 3 (1982) [hereinafter Pérez-Vera Report].[2] The following countries participated in those sessions: Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, the United States, Venezuela and Yugoslavia. During the sessions, a Drafting Committee prepared the text concurrently as the main proceedings progressed. Pérez-Vera Report, 426-27 at ¶ 4. The Drafting Committee was chaired by Allan Leal of Canada. The members of that committee included Louis Chatin of France, R.L. Jones of the United Kingdom, Reporter Elisa Pérez-Vera of Spain and amicus curiae Matti Savolainen of Finland.

Matti Savolainen, who attests to his recollection of the Hague Convention negotiations and drafting through this submission, served as Counselor of Legislation at the Finnish Ministry of Justice from 1971-2000 and was a member of the Finnish delegation at the Diplomatic Conferences of the Hague Conference on Private International Law in

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[2] *See* Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10494, 10503 (1986) ("[Professor Pérez-Vera's] explanatory report is recognized by the [Hague] Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it.").

1976, 1980, 1984 (as Chairman of Commission I (General Affairs)) and 1988. Mr. Savolainen participated in both meetings of the Special Commission that immediately preceded the full Conference in 1980 and, thus, was involved with the drafting process from the beginning, including the development of the draft treaty that emerged from the second meeting of the Special Commission. As noted above, Mr. Savolainen was one of five members of the Drafting Committee that prepared the Convention in its final form in 1980, and indeed is considered one of the "fathers" of the Hague Convention. *See* Adair Dyer, *To Celebrate a Score of Years!*, 33 N.Y.U. J. Int'l L. & Pol. 1, 2-3 (2000). He is also the author of an article that has been distributed as part of an "accession kit" by the Permanent Bureau secretariat to states interested in acceding to the Convention. *See* Matti Savolainen, *The Hague Convention on Child Abduction of 1980 and Its Implementation in Finland*," 66 Nordic Journal of Int'l Law (*Acta scandinavica juris gentium*) 101-166 (1997) (noting that the remedies for violation of an access order are very limited; the Convention does not provide for the removal of a child based upon such an order).

The United States sent three delegates to the Special Commission meetings and five delegates to the full Hague Conference. Those delegates were Peter H. Pfund (Assistant Legal Adviser for Private International Law, U.S. Department of State); James Hergen (Trial Attorney, Office of Foreign Litigation, U.S. Department of Justice); Patricia Hoff (Congressional Adviser, U.S. Senate); Professor Brigitte M. Bodenheimer (Professor, University of

California Law School, Davis), who, due to illness, was replaced for the full Conference Sessions by Jamison Selby Borek (Legal Adviser's Office, U.S. Department of State) [3]; and amicus curiae Lawrence H. Stotter. *See Membres de la Première Commission,* TOME III, 253-55 at 254.

Lawrence H. Stotter, who also attests to his recollection of the Hague Convention negotiations and drafting through this submission, joined the delegates as a leading family law practitioner. Mr. Stotter is the former National Chairman of the American Bar Association's ("ABA") Family Law Section. He served as State Chairman of the California Bar Family Law Division, where he, along with delegate Professor Bodenheimer, successfully advocated for the enactment of the Uniform Child Custody Jurisdiction Act ("UCCJA") by the California Legislature, and additionally encouraged its enactment in states throughout the United States. Mr. Stotter also served as Editor-in-Chief of the ABA magazine "Family Advocate" and authored

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[3] As noted above, Ms. Jamison Selby Borek, who joined the U.S. State Department in 1979 after having worked for a number of years in children's services (and retired just this year), assumed Professor Bodenheimer's role as lead U.S. spokesperson at the Hague Conference proceedings. *See, e.g., Procès-verbal No 3,* TOME III, 263-67 at 263, 265 [hereinafter *Procès-verbal No 3*]; *Procès-verbal No 4,* TOME III, 268-73 at 269-71 [hereinafter *Procès-verbal No 4*]. In addition to finding that this *amici* submission is consistent with her recollection of the intent of the drafters of the Convention, Ms. Borek also particularly recalls that, since this was a family law, and not a conflicts of law, convention, the overriding principle among the drafters was the best interests of the child, not conflict of laws or preserving judicial jurisdiction.

an oft-cited article on the Hague Convention. *See* Lawrence H. Stotter, *The Light at the End of the Tunnel: The Hague Convention on International Child Abduction Has Reached Capitol Hill*, 9 HASTINGS INT'L & COMP. L. REV. 285-328. Although the United States delegation to the Hague Convention consisted of several other representatives from the State Department, specializing in other areas of the law, it was readily acknowledged and recognized that Mr. Stotter and Professor Bodenheimer were the experts on U.S. custody problems and solutions. As such, Mr. Stotter played an influential role in the drafting negotiations.

After nearly a month of meetings, which included both Mr. Savolainen and Mr. Stotter, the Hague Convention was adopted by unanimous vote of representatives from the twenty-three states that were present at the Fourteenth Session of the Hague Conference on Private International Law in Plenary Session, and signed on October 25, 2009. Pérez-Vera Report, 426 at ¶ 1. Thereafter, Mr. Stotter testified in hearings before U.S. congressional committees, explaining the Convention and the U.S. delegation's position, and advocating for its adoption and implementation in the United States.

Given their level of participation and expertise in the area, Mr. Savolainen and Mr. Stotter's recollections of the intent of the drafters at the time of the Conference should be given considerable weight in interpreting the meaning of the Hague Convention.

II. IT WAS NOT THE INTENT OF THE DRAFTERS THAT *NE EXEAT* ORDERS WOULD QUALIFY AS CUSTODY RIGHTS

A. The Setting in Which the Delegates Met.

The Hague Convention was ultimately adopted as an effort "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, Preamble, TOME III at 413.

Many countries were represented at the Hague Conference, with varying legal systems and approaches to child custody issues. Accordingly, delegates did not always agree, as captured by the *Procès-verbal*, as well as by the voting results. *See, e.g., Procès-verbal No 5*, TOME III, 275-70 at 277 (*Working Document No 11*) (rejecting Working Document No 11 by a vote of 13 against, 11 in favor, with 1 abstention); *Procès-verbal No 6*, TOME III, 283-89 at 285-86 (disagreeing about how possible presumption concerning the exercise of custody rights might be expressed); *Procès-verbal No 9*, TOME III, 303-08 at 303-06 (discussing differing countries' views of public policy exception).

The sharp debate stemmed, in part, from the diverse ways in which the participating countries addressed custody issues. *See, e.g., Replies of the Governments to the Questionnaire*, TOME III, 61-129

at 73-82 [hereinafter Government Responses] (comparing country-specific responses); *see also Procès-verbal No 8*, TOME III, 297-303 at 298 (delegates note that "not exercising [custody rights] in good faith" would have different implications in Germany, the United States, the Netherlands and Finland). For example, joint custody was a relatively novel concept in 1980, and some countries either had very little experience with it, or had not yet recognized it at all. *See Procès-verbal No 3* at 267 (Delegate Leal stated that "[j]oint custody was an unusual concept in Canada"). Similarly, not all countries had implemented the concept of visitation rights, and, as a result, that type of right was not uniformly used. *See* Government Responses at 82 (Denmark notes distinction in its treatment of visitation rights for child born in versus out of wedlock); *id.* at 125 (Czechoslovakia's general rule is that parents determine contact with child in their divorce agreement). It was against this backdrop that the delegates came together.

The Drafters here recall that the main goal and focus of the Convention was the protection of children from abduction by the non-custodial parent. Issues surrounding rights of custody and remedies for breach of a given parent's rights were hotly debated. The Drafters comment on the civility of the debate, however, noting that diverse and opposing positions were expressed respectfully, often followed by a compliment for the previous speaker, even if the message delivered was in complete and utter disagreement. *See, e.g., Procès-verbal No 4* at 270.

B. A Major Distinction Was Made Between Custody Rights and Access Rights.

The Drafters report that from the very beginning of the preparatory work of the Special Commission, it became clear that there were significant differences of opinion as to what types of parental rights should be protected in what way. Discussions were held that revolved around differing attitudes and beliefs held by trial judges around the world as to the "best interests of the child." Judges in some countries felt that those interests were broad and included all contacts and visits with both parents. At the same time, it became clear that a considerable number of delegates were not prepared to give visitation rights the same strong protection that they felt rights of custody deserved. The Drafters struggled with framing legislation that would take into account all of these diverse views. Thus, the concept of separating "custody rights" from "access rights" evolved. The delegates made sure to define these terms to emphasize the sharp distinction that they wished to draw between those two rights. *Compare* Article 5(a) "rights of custody" with Article 5(b) "rights of access." This strong distinction between rights of custody and rights of access cannot, according to the Drafters, be emphasized enough.

"Rights of custody" were defined as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence," while "rights of access" were defined as "the right to take a child for a limited period of time

to a place other than the child's habitual residence." Articles 5(a) and (b). The Drafters recall that it was easier to develop the definition of "rights of access" than "rights of custody," since custody rights were intertwined with what each delegate individually viewed as being in the best interests of the child. Although traditionally, the definition of "custody rights" would include the right to make decisions relating to the child's "health, education and welfare," the consensus was that "rights of custody" would not take on this broad and unmanageable definition.

After distinguishing these two types of parental rights, the delegates concluded that only a breach of "rights of custody" would warrant the drastic remedy of the "right of return." Specifically, Article 3 was drafted with this intent:

> The removal or the retention of a child is to be considered wrongful [thus qualifying for a right of return] where –
>
> *a* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone . . . and
>
> *b* at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Convention Article 3.

"Access rights" were given a lesser remedy intentionally. And that remedy applies even where access rights are very extensive. That remedy is found in Article 21, which allows a parent to seek through the Central Authorities, "arrangements for organizing or securing the effective exercise of rights of access" if those rights are violated. Convention Article 21. Thus, although Article 1(b) of the Convention states that one of the objects of the Convention is to ensure that rights of access are effectively respected in other Contracting States, the implementation of that object of the Convention does not impose upon the Contracting States any obligation to recognize and enforce access orders issued by other Contracting States.

The Drafters point specifically to Article 3 to emphasize that the delegates were fully aware of and accounted for joint custody rights. The language of Article 3 itself so contemplates. Reviewing the facts as presented in the merits briefs on this appeal, the Drafters note that the Chilean trial court seemed to appreciate the stark difference between custody and access rights. On two separate occasions it awarded all custody rights to the mother, while granting only access rights to the father. While it could have made those rights joint, particularly the right to choose where the child lived, it did not. Moreover, the second custody order, in February 2005, issued when the father once again sought, but was denied, any custody rights, was made following the *ne exeat* order of January 2004. Yet the court did not provide the father with *any* custody rights, nor did it tie its *ne exeat* order to any custody rights granted to the mother. In fact, the court made no

order limiting the mother's custody rights at all. On those facts, under the provisions of the Convention, only the mother holds the ability to seek a "right of return." The Drafters strongly disagree with any suggestion that the father's access rights were instead intended by the Chilean court to be part of a bundle of "custody rights." It is the Drafters' view that the Court of Appeals correctly appreciated the intent of the Convention by recognizing the difference between these two types of rights.

C. *Ne Exeat* Orders Were Not Considered Rights of Custody, and It Was Not Intended That They Would Give Rise to the Right of Return.

The Drafters were, at the time of the Convention, quite experienced with *ne exeat* orders, their impact, and their consequences. They were strongly critical of their use as a basis for altering well-considered custody orders. In fact, they did not (and do not) view them as custody rights or even rights of access at all. Instead, it is the Drafters' opinion that *ne exeat* orders are instead an expression of judicial control and/or a retention of jurisdiction (or, more bluntly, a provision to prevent forum shopping in a non-signatory country). Perhaps the most common form of this type of order in the United States is the requirement that a child's and/or a parent's passport(s) be turned over to the court. These types of orders vest control with the court, not rights in either parent; they are thus enforced by contempt, fine or jail, but not by revising custody or access provisions. For example, a trial court could make a

number of negative orders to a custodial parent under a *ne exeat* type order, such as denying the right to live in a dangerous part of town or denying the right to live with a particular person. These are negative orders that shape the custody right, but vest no rights whatsoever in the non-custodial parent, except the right to bring any violation of those orders to the attention of the court and seek appropriate penalties. That scenario does not convert the right into one of custody.

Given that, it was not surprising to the Drafters that *ne exeat* rights were not part of the discussion of what constitutes a custody right, and that *ne exeat* rights similarly did not surface during the debates regarding the definition of rights of access. It is Mr. Stotter's distinct recollection that *ne exeat* orders were never on the convention agenda with regard to defining either custody or access rights, and consistent with that recollection, no such substantive discussions took place.

Indeed, the only time that something akin to a *ne exeat* right was discussed, the concept of granting a right of return for such a violation was put to vote and soundly defeated. The Petitioners, in their brief, note that the "*travaux préparatoires*" raise the idea of *ne exeat* rights as something that the Convention could address. *See* Brief of Petitioner at 42; Brief of United States at 28. As Petitioner notes, the "*travaux préparatoires*" consisted of a series of questions prepared by the Permanent Bureau's First Secretary, Adair Dyer, Petitioner's counsel, which were put to each country in advance of the commencement of the Fourteenth Session in an

attempt to shape the Convention's discussion. The fifth situation listed as a type of child abduction, for purposes of the questionnaire only, was where "[t]he child was removed by a parent from one country to another in violation of a court order which expressly prohibited such removal." Adair Dyer, *Questionnaire and Report on international child abduction by one parent* (Preliminary Document No 1 of August 1978), TOME III, 9-51 at 9. There was no indication in the questionnaire of whether custody rights were also violated in the removal; indeed, the term "rights of custody" had not yet been defined. Brief of Respondent at 41.

Despite the inclusion in the questionnaire, it is the Drafters' recollection that a *ne exeat* scenario was not discussed in any detail again, either in conjunction with the definitions of rights of custody or rights of access or any of the ensuing remedies, until the session on October 8, 1980. *See Documents de travail Nos 4 à 13*, TOME III, 261-63 at 262 (Proposal No 5). At that session, the Canadian delegate, Mr. Allan Leal, addressed Canada's proposal that the right of return be granted for violation of access rights. *See Procès-Verbal No 3* at 266. As an initial matter, Mr. Leal noted that access rights could at times be very substantial and admitted that in Canada joint custody was very rare, as the Canadian courts generally granted custody to one parent and visitation to the other. Mr. Leal then cited two examples of "wrongful removal" in support of his proposal, one of which was a situation where one parent is given custody, but cannot leave the jurisdiction without the other parent's consent. *Id.* at 267. Leal suggested that such a removal should

be subject to the right of return. Debate about this proposal and the specific *ne exeat* example ensued. After several delegates spoke, the proposal was put to a vote. It was soundly defeated by a vote of 19-3.[4] *Id.*

The Drafters find it contrary to reason to suggest that a proposal that was considered and then specifically and expressly rejected was actually impliedly intended to be read into the Convention. For this reason, the State Department's suggestion, in its *Amicus Curiae* brief in support of the Petitioner, that the delegates "understood," following this debate, that *ne exeat* rights were "rights of custody" is simply incorrect. *See* Brief of United States at 20-21. This is a mischaracterization of the delegates' intent on this issue, and the Drafters specifically attest that they had no such "understanding." *Id.*

Indeed, the Drafters had decided that even the most extensive of access rights, such as having the physical care of the child during the summer holiday, would not confer a custody right or a right of return on that parent. It is thus self-evident that lesser rights, such as those arguably afforded by a *ne exeat* order, cannot possibly confer greater

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[4] Working Document No 5 was rejected by the following countries: Australia, Austria, Belgium, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the United States. The three countries in favor of the proposal were Canada, Ireland and Israel. Italy abstained from voting.

substantive rights for a non-custodial parent than access rights of much more significance.

In sum, the Drafters did not intend for a *ne exeat* order to confer a right of custody upon the non-custodial parent. Furthermore, and in keeping with that purpose, the Drafters did not intend that *ne exeat* orders would give rise to a right of return under the Convention.

D. The United States Would Have Strongly Objected to Any Suggestion That *Ne Exeat* Orders Create a Right of Return.

Because of the experience of Mr. Stotter and the other United States delegates (including Professor Bodenheimer) with domestic custody issues,[5] the United States delegation had a strong, overtly expressed position against the use of visitation abuses as a basis for making orders of return or changes in custody. Mr. Stotter's co-expert on custody issues, Professor Bodenheimer, was particularly adamant that these two types of rights be treated separately. Given that position, the United States similarly would have objected strenuously to the idea that *ne exeat* orders are included within "custody rights." Indeed, in the United States' response to the Dyer questionnaire distributed immediately prior to the Hague

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[5] Professor Bodenheimer and Mr. Stotter's experience was pivotal to the universal acceptance of the UCCJA throughout the United States as a workable solution to the child-snatching and forum-hunting that was prevalent prior to the UCCJA's enactment.

Conference, the United States characterized *ne exeat* orders simply as having "the purpose of preserving the jurisdiction of the state in the custody matter and of safeguarding the visitation rights of the other parent." Government Responses at 88 (Question 16). The suggestion that *ne exeat* orders were silently understood or implied to fall within custody rights is simply not tenable—the U.S. delegation was firmly against such an interpretation and would never have let such an issue simply pass by without debate. Indeed, the U.S. delegation's opposition on this issue was so firm that it might have led to the United States' opposition to the entire Convention's adoption. Such an issue certainly would have been evident in the delegates' notes and likely in the minutes as well. Moreover, from Mr. Stotter's own notes, it does not appear that this issue received any debate at the Convention. Any attempt by the Court to impose such a term into the Convention would be to enforce a provision that this signatory country's own delegates would have objected to at the time of drafting.

Furthermore, Mr. Stotter notes that the United States, in its amicus brief submitted in support of Petitioner, fails to take into account the position of the U.S. delegation at the time of drafting. *See generally* Brief of United States. Surely, the intent of the United States delegation should bear on the position of the United States on this issue.

E. The Drafters' Intent Was Correctly Captured by the Appellate Court and Others to Consider the Issue.

Those who have reported on the Hague Convention have agreed with the intent of the Drafters, as expressed here. Specifically, the Reporter for the Permanent Bureau, Elisa Pérez-Vera, who attended all sessions of the Conference and reported on the debate, wrote in the 1980 Explanatory Report, in reference to the Canadian proposal that *ne exeat* rights give rise to a right of return, that "[a]lthough the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during the Fourteenth Session, the majority view was that such situations could not be put in the same category as the wrongful removals which it is sought to prevent." Pérez-Vera Report at 444-45.

Similarly, A.E. Anton's comments, which were written shortly after the conclusion of the Hague Convention, and before any courts attempted to interpret the treaty's language, were, in the Drafters' opinions, too easily disregarded by the United States in its brief. *See* Brief of United States at 20-21 n.12. Mr. Anton was a highly respected

member of the Convention,[6] and took his role and responsibility as Chairman seriously, with careful and considerate weighing of the different attitudes and goals of the varied delegates. Interpretation of specific words and their meaning and consequences, was a special concern of his. His express recollection, quite consistent with that of the Drafters here, that the Commission rejected the view that *ne exeat* rights fell under "rights of custody" is much more than a personal view, but rather a significant indication of the intent of the delegates. A.E. Anton, *The Hague Convention on International Child Abduction*, 30 Int'l & Comp. L. Q. 537, 546 (1981) ("A suggestion that the definition of "abduction" should be widened to cover this case was not pursued.").

The Second, Fourth, Fifth and Ninth Circuits have also reached results that are consistent with the Drafters' recollection of intent. *See Abbott v. Abbott*, 542 F.3d 1081, 1087 (5th Cir. 2008) ("[*N*]*e exeat* rights, even when coupled with 'rights of access,' do not constitute 'rights of custody' within the meaning of the Hague Convention."); *Fawcett v. McRoberts*, 326 F.3d 491, 499-500 (4th Cir. 2003) (prohibiting removal from country without non-

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[6] Dyer, *To Celebrate a Score of Years!*, 33 N.Y.U. J. Int'l L. & Pol. at 3 ("Professor A.E. "Sandy" Anton, the leading Scottish expert on private international law, served as Chairman of the Commission that negotiated and drafted the treaty. A superb draftsman himself, he undoubtedly lent great assistance to the delegations in reaching a clean text, distinguished by its simplicity of style and straightforward treatment of a complex problem. He was one of the outstanding fathers of this Convention...").

custodial parent's consent "does not confer 'rights of custody'"); *Gonzalez v. Gutierrez*, 311 F.3d 942, 952 (9th Cir. 2002) ("[I]t is clear that the 'majority view' of the Convention drafters was that the mandatory remedy of return ought not be available to the left-behind non-custodial parent."); *Croll v. Croll*, 229 F.3d 133, 142 (2d Cir. 2000) (refusing to "overlook[] the stated intentions of the drafters" in holding that a *ne exeat* provision does not provide a return remedy). Only the Eleventh Circuit has reached a contrary result, but that conclusion, too, comports in substance with the Drafters' intent. In *Furness v. Reeves*, 362 F.3d 702 (11th Cir. 2004), although the court found that a *ne exeat* right is sufficient to constitute a right of custody, the parents in that case possessed *joint rights* of custody under Norwegian law, *i.e.*, "joint parental responsibility," which triggered the right of return. There are no such joint rights of custody presented in this situation.

* * *

For these reasons, the Drafters request that the Court honor the original intent of the delegates who authored the Hague Convention and find that a *ne exeat* order does not qualify as a right of custody and, therefore, does not give rise to an automatic right of return.

CONCLUSION

The judgment of the Court of Appeals comports with the intent of the drafters of the Hague Convention and should therefore be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

08-645

IN THE
Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT, *Petitioner*,

v.

JACQUELYN VAYE ABBOTT, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE UNIVERSITY OF CINCINNATI COLLEGE OF LAW DOMESTIC VIOLENCE AND CIVIL PROTECTION ORDER CLINIC AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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November 21, 2009

QUESTION PRESENTED

A *ne exeat* statute or court order requires a custodial parent to seek judicial permission or the non-custodial parent's consent prior to removing a minor child from the country or other jurisdiction where the child resides.

Whether a *ne exeat* court order creates a "right of custody" in the noncustodial parent where the country of the child's habitual residence previously denied custodial rights to the petitioner based on the best interest of the child following a hearing where the parties and their witnesses had an opportunity to be heard.

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INTEREST OF AMICI CURIAE[1]

Amici are family law practitioners and law professors who have experience in family law matters involving children and who recognize the importance of employing the best interests of the child standard when determining custodial and non-custodial rights.

Margaret Drew is Professor of Clinical Law, University of Cincinnati College of Law. She directs the Domestic Violence and Civil Protection Order Clinic ("Clinic") and is a long time family law practitioner. Professor Drew, individually, and the students and lawyers who comprise the Clinic represent family members who have experienced violence in their intimate relationships. The best interest of the child standard is nearly universally accepted as the basis for entering child-centered decisions in family law matters. Counsel and the Clinic are committed to preserving the best interests of the child, even when a parent might have violated a court order. While a non-custodial parent might remove a child without court approval, the needs of the child must be paramount and separate from any legal or personal desire to punish the offending parent.

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[1] The parties' letters of consent are on file with the clerk. No counsel for either party has authored any portion of this brief, nor has any person or entity, other than amici and its counsel, made a monetary contribution to the preparation or submission of this brief.

Interest of Amici Curiae
(continued)

Professor Carrie Hagan-Gray is a Clinical Associate Professor of Law at the Indiana University School of Law – Indianapolis. She is one of two professors directing and supervising the Civil Practice Clinic, having previously directed a family law and domestic violence clinic at Roger Williams University College of Law. A former Urban Morgan Human Rights Fellow at the University of Cincinnati College of Law, she has practiced in family law, domestic violence and guardian ad litem settings, as well as advocated on behalf of clients in federal and state litigation involving the Hague Convention on the Civil Aspects of International Child Abduction. She is committed individually, and via her clinic work, to protecting the best interests of children. She looks to protect the best interest standard used in decision making on children's issues. Professor Hagan-Gray espouses that the best interests of a child for whose benefit a custodial arrangement was identified should not be altered merely because a parent violates a court order. To do so would go against the very nature of a best interest determination and could inadvertently punish a child for the actions of a parent.

Christine L. Butler is a family law attorney who has been in practice in Massachusetts since 1978. Her practice has focused on family law and domestic violence. She currently is a Practitioner in Residence for the Family Advocacy Clinic at Suffolk University Law School and the Director of the

Interest of Amici Curiae
(continued)

Battered Women's Advocacy Project at the law school.

Ilene Seidman is Clinical Professor of Law at Suffolk University School of Law. She directs the Family Advocacy Clinic. Students in these Suffolk University School of Law clinics regularly represent family members in domestic violence and family law circumstances seeking court intervention. The protection they seek is often on behalf of their children as well as themselves. Preserving the best interest standard in family law cases is crucial in order to protect children and establish their needs as primary in all circumstances. While sanctions are permissible when one parent has violated a court order, this must never overshadow the best interests and needs of the child who is the subject matter of the litigation. To alter custody in order to punish the parent would undercut best interest decisions.

SUMMARY OF ARGUMENT

The goal of the *Hague Convention on the Civil Aspects of International Child Abduction* ("*Convention*") is to protect the welfare of the child that was wrongly removed from the home country. At all times the *Convention* is concerned with the best interests of the child. The signatories to the *Convention*, which include the United States and Chile, most commonly employ the best interest of the child standard in determining in the first instance which parent is to be awarded custodial rights. In particular, the courts of both the United States and Chile employ the best interests of the child standard in determining the custodial and visitation rights of the parents. The welfare of the child is paramount in the relevant *Hague Convention* provisions as well as in the Abbott's Chilean custody determination.

When a court employs the best interests of the child standard in determining custody, typically that court has made its decision after a disputed proceeding in which consideration of the child's needs was paramount. In a case where the non-custodial parent has a history of abuse, the need to make all determinations based on the child's best interest, particularly regarding safety, becomes even more compelling.

Conversion of a *ne exeat* privilege into a right of custody would defeat the home court's decision based upon the best interest of the child. To disturb the underlying Chilean court decision in this instance would defeat and vitiate the court's finding that the

child is best served being in the custody of his mother and that the father have rights of access only.

As here, if a court has determined that one parent, for whatever reason, is inappropriate to be the custodial parent, then the removal of the child from a country by the custodial parent does not make the non-custodial parent any more suited to be the child's primary caregiver or decision maker. Interpreting a *ne exeat* statute or order as carrying custodial rights may be attractive when the remedy sought is punishment of the custodial parent who removed the child. However, the reality is that a conversion of *ne exeat* into rights of custody in order to achieve a desired result, in this case return of the child, is not appropriate under the *Convention* because that remedy is not in the best interest of the child. Absent enumerated exceptions, the decision of the original court that decided custody is best left undisturbed out of comity and also in the best interest of the child.

ARGUMENT

I. THE OVERARCHING PURPOSE OF THE HAGUE CONVENTION ON PARENTAL REMOVAL OF A CHILD FROM THE COUNTRY OF HABITUAL RESIDENCE IS THE BEST INTEREST OF THE CHILD.

The *Hague Convention on the Civil Aspects of International Child Abduction*[2] ("*Convention*") provides for the needs of a child who was removed from the child's country of habitual residence. *The Hague Convention on the Civil Aspects of International Child Abduction*, Preamble, Oct. 25, 1980, T.I.A.S. No. 11670. The remedies provided are child-centered. The court in the country to which the child is removed is not charged with re-hearing child custody issues. Indeed, the preferred result is that custody not be re-litigated. *Convention*, arts. 16, 17, 19.

Convention remedies are limited and clearly defined. The best interest of the child is the governing rule. *Convention*, art. 12. If one year or more has elapsed, then the courts are permitted to consider a best interest factor, i.e., whether the child has acclimated to the country to which he or she was removed. *Id.* The petitioned court may hold best interest hearings on other narrow issues. For example, at any stage of the legal proceedings, the petitioned court may weigh whether or not return of the child to the home country will place the child at

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[2] Congress enacted the *International Child Abduction Remedies Act* to implement the *Hague Convention*. *See* 42 U.S.C. §§ 11601 et seq. (2006).

grave risk. If the court determines the presence of a grave risk, then the court is instructed by the *Convention* to deny return. *Convention,* art. 13(b). Finally, the court may hold a hearing to decide return of the child if the child is of suitable age to state an opinion on return. *Id.* The current status of the child's well being, the age, and adjustment of the child are traditional best interest standards. *See, e.g.,* CONN. GEN. STAT. § 46b-56(c)(9) (2009); and ALASKA STAT. § 25.24.150 (2006).

Clearly, the best interest analysis is a paramount purpose of the *Hague Convention* articles concerning the removal of a child as the enumerated examples of factors the petitioned court may consider demonstrates. The *Convention's* purpose is protecting the welfare of the child. "The best interest of the child shall be a guiding principle of interpretation...." Report of Roundtable 3, Model Rules of Procedure for the International Return of Children, art. 2. (Sept. 2007). When viewed through what legal expert Merle Weiner calls the "purposive" lens, respect for the best interest of the child standard is accomplished by the petitioned court's respecting the custody decision made by the jurisdiction of habitual residence. Merle Weiner, *Navigating the Road Between Uniformity and Progress: The Need for a Purposive Analysis of the Hague Convention on the civil Aspects of International Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 293-294 (2002). The *Convention's* goal of avoiding re-litigation of custody disputes can be achieved by honoring the custody determination entered prior to the child's removal. That original custody decision should remain undisturbed absent a

circumstance that falls within one of the exceptions referenced above. *Id.*

Despite the temptation to be parent focused, the concern for the welfare of the child must be the determining factor when considering the remedy applied under Hague petitions.

II. THE BEST INTEREST OF THE CHILD IS ACCEPTED BEST PRACTICE IN BOTH THE UNITED STATES AND IN COUNTRIES THAT ARE SIGNATORIES TO THE HAGUE *CONVENTION*.

A. United States Federal and State Laws Employ the Best Interest of the Child Standard.

The best interest standard is "central to American family law": each of the United States employs the best interest of the child standard when making child custody determinations. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 337 and 370 (2008). At the federal level, several statutes contain the best interest standard. For example, the Parental Kidnapping Prevention Act (PKPA) incorporates the best interest of the child. 28 U.S.C. § 1738A(c) (2006). Congress expressed clear statutory intent that the PKPA should resolve custody and visitation conflicts in the best interests of the child. The Congressional Findings and Declaration of Purpose for the Act states that "[t]he general purpose [of the Act is to]

promote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child." Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7, 94 Stat. 3566 (1980) (codified as amended at 28 U.S.C. § 1738A (2006)). The PKPA, which applies only to disputes between U.S. states, favors giving full faith and credit to the child custody determination made in the child's home state.

In addition to the use of the standard in the PKPA, the standard is found in many other federal laws. For example, the standard appears at least a dozen times in the Federal Adoption Assistance and Child Welfare Act. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980). The best interest standard is also found in the Adoption and Safe Families Act of 1997, Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C. § 673 (2008)), the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C.A §§ 1912(b), 1916(a) (1989)), and the Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C.A. §§ 5101 et seq., 5111 et seq. (1996) (as amended by the Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 800 (2003) (codified at 42 U.S.C. § 5106 (2006))).

B. The Best Interest of the Child Standard Is Applied Internationally in the Determination of Child Custody Rights.

Internationally, the best interest standard has been adopted by many countries and expressed in several acts and treaties. The *European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children* (1980) recognizes the standard in its preamble. The *African Charter on the Rights and Welfare of the Child* (1990) views the best interests of the child standard as paramount: "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration." *Id.* art. 4. The best interest of the child standard appears in Article 11 of the *Inter-American Convention on The International Return of the Child.* The best interest of the child standard is employed as a safeguard procedure which can override requirements for return. *ICARA*, art.11.

The *Hague Convention* itself incorporates the best interest standard through its child focused doctrine and terms. "[T]he interests of children are of paramount importance in matters relating to their custody...." *Convention*, preamble. The model rules for procedures for returning children internationally support reliance on the decision of the court of the child's habitual residence as being in the child's best interest. This reliance is predicated on the best interest of the child being the guiding principal of the Convention. Report of Roundtable 3, Model Rules of

Procedure for the International Return of Children, art. 2 (Sept. 2007). Likewise, the petitioned court's decision on whether the child has integrated into the new location is to be determined by reference to the child's best interest. *Id.* art. 18.3.

C. Chile Employs the Best Interest of the Child Standard in Making Determinations on Child Access Issues.

When a Chilean Court determines how much access a non-custodial parent has to a child, it does so in consideration of the best interests of the child. CÓDIGO CIVIL DE CHILE art. 229. Similarly, when one parent has engaged in abusive behavior, it is in the interest of the child that custody be awarded to the other parent. *Id.* art. 225. "The main concern of the parents is the best interest of the child...." *Id.* art. 222. When the Chilean court awarded custody to the mother of A.J.A., the child in this case, it did so under its legal obligation to consider the best interest of the child.

III. THE DETERMINATION MADE BY THE CHILEAN COURT SHOULD BE RESPECTED AND NOT DISTURBED BECAUSE THE CHILEAN COURT ALREADY DECIDED THE LEGAL ISSUE OF CUSTODIAL RIGHTS.

A. The Judgment of the Chilean Court Made Prior to Removal of the Child Should be Honored.

The judgments of foreign courts are entitled to respect from the Courts of the United States. While foreign judgments are not entitled to full faith and credit, they are to be given due weight when considered by U.S. Courts. *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142, 148-49 (2d Cir. 2008). When interpreting international conventions, the decisions of foreign courts should be given considerable weight. *Air France v. Saks*, 470 U.S. 392, 404 (1985). Indeed, when a foreign court has determined the same legal issue, such as custody, particularly in matters involving treaty interpretation, the decision of the foreign court is to be given preference. *Blondin v. Dubois*, 1889 F.3d 240, 248-49 (2d Cir. 1999). "While comity typically refers to how courts of one country should treat the decisions by courts of another country in the same matter, comity can also function as a canon of construction when a foreign court has already decided the same legal issue in a different case." Weiner, 33 COLUM. HUM. RTS. L. REV. at 287.

Whether or not a prior determination of custody exists is an initial and pivotal consideration in a Hague determination of whether or not the child is

required to be returned to the country determined to be the child's habitual residence. *See Villegas Duran*, 534 F.3d at 147 (second factor petitioner must establish by preponderance of the evidence is that the removal was in breach of custody rights under the law of the country of habitual residence). In this case, a prior determination of custody exists. The child in this case, A.J.A., was a habitual resident of Chile. His parents' rights of custody and visitation were determined by the Chilean court prior to A.J.A.'s removal.

The petitioned courts are instructed not to re-litigate custody issues. *Convention,* art. 16; *see also March v. Levine*, 136 F. Supp. 2d 831, 843-844 (M.D. Tenn. 2000) (citing *Tehan v. Duquette*, 613 A.2d 486, 489 (N.J. Super. App. Div. 1992)). Therefore, respect must be accorded to the Chilean court's allocation of parental custody and visitation.

B. The Ability of the Petitioned Court to Re-Try Custody is Limited. Any Such Ability is Based Exclusively on the Best Interest of the Child.

The ability of the petitioned court to revisit the issue of where the child may reside, what the habitual residence of the child is, and the allocation of custodial rights is strictly limited. *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996).

The petitioned court may entertain new evidence only under very limited circumstances. *Id.* Where the child has resided in the removed-to country for

more than one year prior to filing of the petition and where a court has determined that removal is an appropriate remedy, the petitioned court may consider the best interests of the child in narrow circumstances. This determination may include consideration of whether the child has acclimated to his or her new country of residence. *Convention*, art. 16. Other factors that the petitioned court may consider are the welfare and safety of the child should the child return to the country of habitual residence. The preference of a child mature enough to voice an opinion may also be considered by the petitioned court. *Convention*, art. 13. Therefore, although a court may deny a petition to return a removed child only in narrow circumstances, all those circumstances strongly favor the best interest of the child.

The reason the law favors returning the child to the residential country is to return the status quo and so that the left-behind parent may enjoy the child. *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993). The return remedy presumes that the country of habitual residence had previously made a determination that the left-behind parent was an appropriate custodian of the child. *Convention*, art. 1(b).

Many factors can influence a parent's removal of a child to a distant location. Removal of the child does not per se warrant a change in the custodial arrangement. *See, e.g., D.C. v. J.S.*, 790 N.E.2d 686 (Mass. App. 2003). As here, when a parent has been found to be the proper custodian in the best interest of the child, the petitioned court should not disturb

the prior family court's custody order merely because the removing parent violated a statute or order. Modifying custodial privileges to accommodate return of the child is a tempting remedy in the hope of discouraging future contemptuous child removal. That remedy may provide some satisfaction as punishment of the violating parent whom the court does not want to reward for a statutory or court order violation. Such a judgment, however, whether made to punish the removing parent or to encourage the child's return, accommodates the desires of the left-behind parent, but does not consider the best interests of the child. "[P]unitive custody transfers-whether in relocation settings or otherwise-cannot present sensible results. Although this conclusion may be intuitively obvious only when domestic hostility or violence is present, it is also the logically inescapable result of a child-centered inquiry." Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L.Q. 281 (2006).

IV. THE CHILEAN COURT FOUND THAT THE MOTHER WAS THE APPROPRIATE CUSTODIAL PARENT AND LIMITED THE FATHER TO VISITATION ONLY.

In this case, a prior determination of custody and visitation rights exists. The decision is supported by an extensive record. J.A. 9-40. The father and mother called witnesses on their behalf and on behalf of the child. The Chilean Court was very clear that

it fully considered the factors affecting the welfare and best interests of the child.[3]

The court records reflect that the court considered the following evidence:

The father was verbally and physically abusive toward the mother; the father was abusive with the son as supported by testimony; the father did not tend to the boy's particular needs. JA 12. It was the mother who saw that the son obtained counseling to deal with the trauma of the abuse and the divorce. JA 10. The mother cared for the child's needs since his birth. The mother was able to put the son's needs ahead of her own, although she had suffered throughout the marriage from her husband's abuse as well. The mother was best suited to tend to the child and was found to have done a capable job of rearing the son prior to and after the parties' separation. JA 28-29.

The record shows that the father continued his coercive tactics following the divorce, as well. The father was over $23,000.00 in support arrears when the mother left Chile, a country in which she was unable to work due to visa restrictions. Chilean law is quite clear on the obligation of parents to support their children. CÓDIGO CIVIL DE CHILE art. 222. Yet the father failed to do so. The father's depriving the child of adequate support was not in the child's best interest. His failure to support A.J.A., if he had the means to do so, would fall within the realm of

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[3] The factors considered by the Chilean Court in resolving the custody dispute are comparable to those used in the United States. *See, e.g.*, MASS. GEN. LAWS ch. 208, §§ 28, 31,31A (2009).

abusive tactics. Mary Ann Dutton and Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743 (2005). The father's failure to support his child while A.J.A. was under the mother's care is grounds under the Chilean Civil Code to deny the father the personal care of A.J.A. CÓDIGO CIVIL DE CHILE art. 225.

The consideration of abuse, as well as the failure of a parent to place his or her own needs before those of the child, can be factors considered in the United States under the best interest of the child standard, as well. The history of violence, and well a failure to provide support, are often considered in determining the extent of custodial rights and the terms of access. See for example, Mass. Gen. Laws. Ch. 208 §§ 28, 31,31A (2009)

V. CONVERTING *NE EXEAT* OR SIMILAR STATUTORY SCHEMES INTO RIGHTS OF CUSTODY WOULD VITIATE THE WORK OF THE ORIGINAL COURT THAT HAS DETERMINED THE CUSTODIAL BEST INTEREST OF THE CHILD.

A. When the Chilean Court Determined that Mrs. Abbott was the Appropriate Custodial Parent, a Statutory Prohibition on the Removal of the Child Already Existed.

The parties agree that under Chilean law, the statutory equivalent of a *ne exeat* order was in place.

This prohibition was in place at the time that the Chilean court awarded custody of A.J.A. to his mother. Minors Law, No. 16,618 art. 45 (Chile); JA 55-56. Despite this prohibition on removal, nowhere in the judgment of the Chilean court is there an exception carved out for A.J.A.'s father to be awarded rights of custody, even in this narrow circumstance. Similarly, when the *ne exeat* order entered, there was no adjustment to the original custody order either diminishing the rights of A.J.A.'s mother or in awarding his father any custodial rights. A plain reading of the orders of the Chilean court clarifies that at no time was the father awarded rights of custody.

B. The Conversion of a *Ne Exeat* Prohibition into a Custody Right Undermines the Convention's Statutory Scheme in Providing Different Remedies for Parents with Rights of Access and Those with Rights of Custody.

The *Convention* provides very different remedies for those parents with custody rights and those with rights of access (visitation). The custodial parent whose child was removed enjoys the remedy of the return. *Convention*, art. 12. Parents with rights of access do not. *Convention*, art. 26 Many might be unhappy with the failure of the *Convention* to provide the remedy of return to all parents. Public sentiment or the emotional plea of an abandoned parent is insufficient to defeat the enforcement of a convention whose terms are clear. It is understandable why a non-custodial parent might offer any argument to

convert rights of access into rights of custody for the purpose of restoring easier access to the child. The transformation of a statutory prohibition on removal or the limitation of a *ne exeat* order cannot be permitted to undermine the previously determined best interest of the child. Nor should unhappiness with a statutory framework be sufficient grounds for avoiding the obvious remedy of amending that framework.

At the time of divorce, the parties can determine the best interest of the child. Absent agreement, a court may enter its judgment on the best interest of the child. The Chilean court did just that. The determination of child custody at the time of divorce, or at a subsequent hearing, when decided prior to the removal, is the appropriate judgment to be honored by the petitioned court. Assuming none of the exceptions to removal are raised by the defending parent, there are sound reasons for leaving the original custody judgment undisturbed without the artificial overlay of a purported and strained right of custody.

C. Conversion of *Ne Exeat* Orders into Rights of Custody Accomplishes Adult Goals of Punishment at the Expense of the Best Interest of the Child.

The original order of custody in this matter was entered at a time when the best interest of the child was assessed without the emotional overlay of removal. The Court looked at the parenting history

of the parties as well as the quality of the environment and nurturing the parents could provide to the child. The Court's decision was framed in the best interest of the child. This more dispassionate assessment, made when neither parent was claiming violation of any of his or her "rights" relative to removal, provides a better guide to the child's best interest.

Despite the language of best interest statutes and best interest language as promoted under the *Convention*, the emotional plight of the left behind parent often is sufficient to shift our focus to the alleged "rights" of that parent. Empathy may be with the left behind parent but empathy should not shift our focus from the child. The expected legal response toward a contemptuous parent may be punishment of the contemptor. The instinctual response of those concerned with parental "rights" might be to punish the contemptor by depriving that parent of custody, or by diminishing his or her custodial rights. The fact remains, however, that the perceived or real rights of parents are secondary to the best interest of the child. A change in custodial rights in order to accommodate the legal desire to punish or a parental need for vindication cannot be permitted. Children have needs that are unrelated to removal. Attachment to a custodial parent and a parent's ability to tend to the emotional and physical needs of the child are but a few of the child centered considerations in determining custody. Access to both parents is certainly a factor to be considered, but the *Hague Convention* already provides a remedy for access. *Id.* The Chilean court made its assessment of A.J.A.'s needs. To disturb those

findings would be to ignore the best interest of the child.

CONCLUSION

The judgment in this matter as entered by the Fifth Circuit should be affirmed.

Respectfully Submitted,

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